(16)

No. 04-9728
Title: Donald Curtis Samson, Petitioner
v.
California
Docketed: April 20, 2005
Lower Ct: Court of Appeal of California, First Appellate District
Case Nos.: (A102394)
Decision Date: October 14, 2004
Discretionary Court
Decision Date: January 12, 2005
Questions Presented

Date	Proceedings and Orders
Apr 12 2005	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 20, 2005)
May 18 2005	Waiver of right of respondent California to respond filed.
Jun 1 2005	DISTRIBUTED for Conference of June 16, 2005.
Jun 13 2005	Response Requested . (Due July 13, 2005)
Jul 7 2005	Brief of respondent California in opposition filed.
Jul 20 2005	Reply of petitioner Donald Curtis Samson filed. (Distributed)
Jul 21 2005	DISTRIBUTED for Conference of September 26, 2005.
Sep 27 2005	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Oct 14 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including November 28, 2005.
Nov 23 2005	Brief amici curiae of American Civil Liberties Union and ACLU of Northern California filed.
Nov 28 2005	Brief amicus curiae of Citizens United for Rehabilitation of Errants filed.
Nov 28 2005	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Nov 28 2005	Brief amici curiae of California Public Defenders Association, et al. filed.
Nov 28 2005	Brief amici curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
Nov 28 2005	Joint appendix filed.
Nov 28 2005	Brief of petitioner filed.
Nov 30 2005	SET FOR ARGUMENT on Wednesday, February 22, 2006.
Dec 18 2005	Extension of time within which to file respondent's brief on the merits to and including January 13, 2006.
Dec 20 2005	CIRCULATED.
Jan 11 2006	Brief amici curiae of Pennsylvania, et al. filed. (Distributed)
Jan 12 2006	Brief amicus curiae of County of Los Angeles, CA filed. (Distributed)
Jan 13 2006	Brief amicus curiae of United States filed. (Distributed)
Jan 13 2006	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Jan 13 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. (Distributed)
Jan 13 2006	Brief of respondent California filed. (Distributed)
Jan 13 2006	Brief amicus curiae of Los Angeles County District Attorney filed. (Distributed)

Docket for 04-9728

Jan 23 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 23 2006	Record received from Appellate Courtof California, First Appellate District. (1 box)
Feb 10 2006	Reply of petitioner Donald Curtis Samson filed. (Distributed)
Feb 22 2006	Argued. For petitioner: Robert A. Long, Jr., Washington, D.C. For respondent: Ronald E. Niver, San Francisco, Cal.; and Jonathan L. Marcus, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

No. 04-9728

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD CURTIS SAMSON -- PETITIONER

vs.

PEOPLE OF THE STATE OF CALIFORNIA -- RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the Fourth Amendment prohibit police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Facts 2

II. Procedural History, Including When and How the Federal Question Sought to Be Reviewed Was Raised and How the California Courts Passed on It 4

REASONS FOR GRANTING THE PETITION 8

I. This Case Presents an Important Question of Fourth Amendment Law That the California Courts Have Decided in a Way That Conflicts With Decisions of Other States' Courts and Federal Courts of Appeals. 8

CONCLUSION 15

INDEX TO APPENDICES

Appendix A: Opinion of California Court of Appeal (Oct. 14, 2004)

Appendix B: Order of California Supreme Court denying review (Jan. 12, 2005)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided this case was January 12, 2005. A copy of that decision appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

I. Facts

On September 6, 2002, at about 5:34 p.m., San Bruno (California) police officer Alex Rohleder made contact with, as he testified, "two adults and a little baby walking down the street." The two adults were petitioner Donald Curtis Samson (hereafter Mr. Samson) and a friend named Deborah Watson. Officer Rohleder recognized Mr. Samson from a prior contact. Rohleder was aware that Mr. Samson was on parole, and Rohleder "was under the impression that he might have a parolee at large warrant." Rohleder had heard that Mr. Samson once stated, during a previous contact with South San Francisco police about an incident with his girlfriend, that he would not be taken back to prison.

Upon inquiry by Rohleder, Mr. Samson confirmed that he was on parole but stated that he had already taken care of the warrant. Rohleder called the matter in and confirmed the information Mr. Samson had given him. Rohleder nonetheless decided to search Mr. Samson, because he was on parole. The search was not for officer safety. Mr. Samson had not done anything to give the officer probable cause for a search; he "was just walking down the street" with a woman who had a baby. Mr. Samson did not give the officer permission to search him. Asked whether he had searched Mr. Samson merely "because you could," the officer testified:

> Because it's a condition of his parole. I believe that being [a] parolee, that he needs to make sure he's still obeying the laws. It's a privilege for him to be out here.

Asked on cross-examination whether he searches all parolees with whom he makes contact, Rohleder testified: "It depends." He added:

> If I drive by one and I already dealt with him earlier in the day or have dealt with him, I just drive by. I have other work to do. I don't go after everybody all the time.

After waiting for a cover officer, Rohleder "conducted a parolee search" of Mr. Samson. Rohleder recovered a cigarette pack which contained, in addition to cigarettes, a "plastic baggie" containing what Rohleder believed was methamphetamine. Rohleder arrested Mr. Samson. A later test showed that the substance in the "baggie" contained methamphetamine. The substance weighed 2.17 grams, which is a usable quantity of methamphetamine.

Mr. Samson's parole agent, Bernard Martinez, testified that Mr. Samson was, indeed, on parole on September 6, 2002. Mr. Samson was subject to a search condition, which stated:

> You've agreed to search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause.

Martinez testified that Mr. Samson was on parole for possession of a firearm by an ex-felon.

Deborah Watson testified that she and her three-year-old son, Jefferson, were walking with Mr. Samson when Officer Rohleder approached them and asked Mr. Samson whether there was a warrant for his arrest. Mr. Samson "replied: 'What?' Like hesitated, surprised." Then Rohleder told Mr. Samson to put his hands on a car. Mr.

Samson complied, and officer searched him. Later, Rohleder told Mr. Samson to take off his jacket, searched the jacket, then searched Mr. Samson a second time. He asked Ms. Watson to wait right there with her child. After going to the police car, Rohleder approached Ms. Watson, asked her some questions, and told her to empty her pockets, which she did.

According to Ms. Watson, Rohleder "did not ask me for permission. He just told me to empty my pockets out and if I had any weapons or any drugs on me." Rohleder testified that he searched Ms. Watson with her consent.[1]

II. Procedural History, Including When and How the Federal Question Sought to Be Reviewed Was Raised and How the California Courts Passed on It

The prosecution filed an information on October 11, 2002, and an amended information on December 13, 2002. The latter charged Mr. Samson with one felony count of possession of methamphetamine (Cal. Health & Safety Code § 11377(a)). The information also alleged two prior felony convictions under the Three Strikes law (Cal. Penal Code § 1170.12(c)(2)) and two prior prison terms (Cal. Penal Code § 667.5(b)). One of the prior felony convictions alleged under the Three Strikes law was stricken, at

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[1] Defense counsel asked Rohleder why he had asked Ms. Watson for consent to search her. The trial court sustained the prosecution's objection on relevance grounds. Defense counsel also asked: "Well, when you stop a parolee, do you search everyone that's with him?" The trial court again sustained a relevance objection.

the prosecution's request, on March 20, 2003. Mr. Samson pled not guilty and denied the special allegations.

Mr. Samson filed a motion under California Penal Code section 1538.5 on November 8, 2002, seeking to suppress as evidence the methamphetamine found in the cigarette pack in his shirt pocket. The motion argued that the warrantless search violated the "limited Fourth Amendment rights" retained by Mr. Samson as a parolee with a search condition. The prosecution filed written opposition. The prosecution asserted that the search was legal under *People v. Reyes*, 968 P.2d 445 (Cal. 1998), even "without any particularized suspicion of criminal activity," because Officer Rohleder "knew the Defendant was on parole" and "knew the Defendant had committed a violation of section 12021(a) of the Penal Code (felon with a gun)."

The trial court conducted a hearing on the motion to suppress on December 6, 2002, and December 13, 2002. On the latter date, the trial court announced its ruling denying the motion to suppress:

> [T]he Court finds as follows, that the defendant was on parole subject to search and seizure. That the officer had a basis in his mind to stop the defendant, while erroneous, it wasn't arbitrary or capricious. The act of searching him was within his power given the nature of the defendant's parole offense, namely, ex-felon in possession of a firearm and was certainly prudent to make the search, not only for the protection, itself, but to make sure that parolee is not in violation of the law, which, as it turns out, he was finding dope, and I don't find that his actions were capricious or arbitrary, and therefore, I deny the motion based upon the credibility and evidence of the witness.

A jury trial began on March 19, 2003. On March 24, 2003, the jury found Mr. Samson guilty. The parties agreed to a court trial on the special allegations. On the same day, the court found the allegations true. On April 21, 2003, the trial court sentenced Mr. Samson. The court imposed the upper term of three years for Mr. Samson's conviction of violating California Health and Safety Code section 11377(a), doubled to six years under the Three Strikes law (Cal. Penal Code § 1170.12(c)(1)). With the prosecution's concurrence, the trial court imposed only one of the two one-year prior prison term enhancements. The total sentence was seven years in state prison.

Mr. Samson filed a timely notice of appeal on April 21, 2003. On appeal, he renewed his argument that the search violated the Fourth Amendment. Mr. Samson asserted that (1) even under *People v. Reyes*, 968 P.2d 445 (Cal. 1998), which held that no individualized suspicion was constitutionally required to search a parolee (*id.* at 451), the search was unreasonable and violated the Fourth Amendment, because it was arbitrary, capricious and harassing (*see id.* at 450-451) (Appellant's Opening Br. at 9-14); and (2) the search was not justified by a reasonable suspicion of criminal activity, which the Fourth Amendment requires to justify a warrantless search of a parolee subject to a search clause, contrary to the majority opinion in *People v. Reyes* (Appellant's Opening Br. at 15-17).[2]

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[2] Mr. Samson also argued that the trial court awarded him too few credits for days in actual local custody and for local conduct. In supplemental briefing after this Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), Mr. Samson argued that the (continued...)

The California Court of Appeal rejected Mr. Samson's Fourth Amendment claim and affirmed his conviction, in an opinion issued on October 14, 2004.[3] The intermediate appellate court was obliged to, and did, adhere to the rule established by the California Supreme Court's majority opinion in *People v. Reyes*. Accordingly, the court rejected Mr. Samson's argument that the search of his person violated the Fourth Amendment because it was not justified by a reasonable suspicion of criminal activity. (Opn. 3-4.) The court also concluded that the search was not arbitrary, capricious or harassing. (Opn. 4-5.)[4]

Mr. Samson sought discretionary review from the California Supreme Court, asserting that the court should grant review to reconsider, and ultimately overrule, its 1998 *Reyes* holding that no particularized suspicion is required to uphold the warrantless

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[2](...continued)
trial court violated his Sixth Amendment right to jury trial when it imposed an upper term based on aggravating factors that were neither found true by a jury nor found true beyond a reasonable doubt.

[3] The Court of Appeal's opinion (hereinafter Opn.) is Appendix A to this petition.

[4] The court upheld Mr. Samson's claim of error regarding sentence credits. (Opn. 5.) It rejected his claim that the trial court's imposition of the upper term without a jury trial on aggravating factors violated the Sixth Amendment as interpreted in *Blakely v. Washington*. (Opn. 5-17.)

search of a person who is subject to a parole search condition. (Pet. for Review at 4-11.)[5]

The California Supreme Court denied review on January 12, 2005.[6]

REASONS FOR GRANTING THE PETITION

I. This Case Presents an Important Question of Fourth Amendment Law That the California Courts Have Decided in a Way That Conflicts With Decisions of Other States' Courts and Federal Courts of Appeals.

In *People v. Reyes*, 968 P.2d 445, the California Supreme Court precedent that the Court of Appeal below followed, a four-to-three majority overruled *People v. Burgener*, 714 P.2d 1251 (Cal. 1986), which had held that a warrantless search of the person or property of a parolee must, in order to survive Fourth Amendment scrutiny, be justified by at least a reasonable suspicion that the parolee has violated, or is planning to violate, the law or a parole condition. *People v. Reyes*, 968 P.2d at 446, 450-451. The *Reyes* majority held that "a parole search may be reasonable despite the absence of particularized suspicion." *Id.* at 451.

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[5] Mr. Samson also sought review of the court of appeal's denial of his Sixth Amendment jury trial claim under *Blakely v. Washington*. (Pet. for Review at 11-23.)

[6] The order denying review is Appendix B to this petition. With regard to the issue under *Blakely v. Washington*, the order specified that the denial of review was without prejudice to any relief to which Mr. Samson might be entitled after the California Supreme Court decides two pending cases on the application of *Blakely* to California law.

In her *Reyes* dissent, California Supreme Court Associate Justice Joyce Kennard pointed out that most courts which have considered the issue have held that a suspicionless search of a parolee by a police officer violates the Fourth Amendment:

> To summarize, state and federal courts that have considered the validity of parole or probation searches have generally adopted either a reasonable suspicion requirement, as this court did in *Burgener, supra*, 41 Cal.3d 505, or a rule barring searches when the parole or probation officer was acting as an agent of the police, or they have adopted both rules.

People v. Reyes, 968 P.2d at 456 (Kennard, J., concurring and dissenting).

Several years after *Reyes* was decided, this Court noted, but did not decide, the question whether the Fourth Amendment would allow the search of a *probationer* with no individualized suspicion of criminal wrongdoing. The Court held that probable cause was not required to justify the warrantless search of a probationer who was subject to a search condition; reasonable suspicion was enough. "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." *United States v. Knights*, 534 U.S. 112, 121 (2001). The Court stated that it "need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." *Id.* at 120 n.6.

In the wake of *Knights*, several lower courts have held that the *Knights* rule applies to parolees as well as probationers. *See, e.g., Knox v. Smith*, 342 F.3d 651, 657 (7th Cir.

2003) (seizure of parolee "based only on reasonable suspicion" that he had violated terms of release agreement would satisfy Fourth Amendment); *United States v. Loney*, 331 F.3d 516, 520-21 (6th Cir. 2003) ("it is now beyond question that a state statute survives Fourth Amendment scrutiny if it authorizes searches of parolees based on a reasonable suspicion that an individual is violating the terms or conditions of parole"). Probationers and parolees often are treated alike for Fourth Amendment purposes. *See, e.g., Moreno v. Baca*, 400 F.3d 1152, 2005 U.S. App. LEXIS 3739, *17-*18 (9th Cir. 2005); *United States v. Tucker*, 305 F.3d 1193, 1199 n.1 (10th Cir. 2002); *United States v. Thomas*, 729 F.2d 120, 125 n.1 (2d Cir. 1984). *Cf. People v. Woods*, 981 P.2d 1019, 1031 (Cal. 1999) (Brown, J., dissenting) (criticizing majority opinion on ground that it "reintroduces a disparity between parolees and juvenile probationers on the one hand, and adult probationers on the other").

The question about suspicionless searches left open by *Knights* has, however, been decided differently in the various state and lower federal courts. The California courts, including the Court of Appeal below, continue to follow the *Reyes* holding that the Fourth Amendment allows the police to search a person who has a parole search condition, with *no* particularized suspicion, "reasonable" or otherwise. (Opn. 4); *People v. Zichwic*, 114 Cal. Rptr. 2d 733, 740 (Cal. Ct. App. 2001) ("*Knights* did not cite *Reyes* and did not reach the issue decided in *Reyes*, that a parole search does not require a particularized suspicion. As an intermediate state appellate court, we, of course, are bound by decisions of the California Supreme Court."). *Cf. People v. Sanders*, 73 P.3d 496, 506 (Cal. 2003)

(reiterating *Reyes* holding but noting contrary Ninth Circuit panel decision, described below).

Courts of other states and of federal circuits have continued, after *Knights*, to reach conclusions contrary to that of the *Reyes* majority, as Justice Kennard noted the majority of jurisdictions had before *Reyes*. Louisiana, for example, requires that even a *parole officer* harbor a "reasonable suspicion" of criminal activity before searching a parolee without a warrant. *State v. Bonner*, 811 So. 2d 1151, 1153-54 (La. Ct. App. 2002) ("While the decision to conduct a warrantless search of a parolee and his home must be based on something more than a mere hunch, probable cause is not required, and only a reasonable suspicion that criminal activity is occurring is necessary for a parole officer to conduct a warrantless search."). Pennsylvania requires that the warrantless search of a parolee be performed by a parole officer, and it requires both a "reasonable suspicion to believe that the parolee committed a parole violation" and that the search be reasonably related to the parole officer's duties. *Commonwealth v. Hughes*, 836 A.2d 893, 899 (Pa. 2003).

The Sixth Circuit has been even more protective of parolees' Fourth Amendment rights. In *United States v. Carnes*, 309 F.3d 950 (6th Cir. 2002), a panel majority concluded that government agents required both a warrant and probable cause to seize and listen to audio tapes, found at the home of a parolee's girlfriend after the parolee's arrest there, which were used against the parolee at trial. *Id.* at 953, 956, 959-960, 963. A dissenting judge would have held that only a reasonable suspicion of a crime or parole

violation was required. *Id.* at 964 (Kennedy, J., dissenting.) That judge wrote: "I read *Knights* as creating a categorical rule that searches of parolees and probationers subject to search conditions require reasonable suspicion of the commission of a crime or parole violation, not probable cause." *Id.* That rule is the one urged by Mr. Samson in the instant case, but it is contrary to the California rule, which holds that no particularized suspicion is required for a parole search.

Whether or not California's rule, as stated in the *Reyes* majority opinion, is correct has been the subject of sharp conflict among the judges of the United States Court of Appeals for the Ninth Circuit. In 2003, a divided three-judge panel held that the standard embraced by the *Reyes* majority does not comport with the Fourth Amendment and that the search of a parolee's home pursuant to a parole condition is unreasonable if it is not supported by a reasonable suspicion of wrongdoing. *United States v. Crawford*, 323 F.3d 700, 715-16 (9th Cir. 2003). The Ninth Circuit granted rehearing en banc, and in June 2004, the court affirmed the defendant's conviction on the ground that, even if the search violated the Fourth Amendment, the defendant's subsequent statement to police was not a product of that search and did not have to be suppressed. *United States v. Crawford*, 372 F.3d 1048, 1052, 1057-59 (9th Cir. 2004). The majority opinion specifically noted: "We need not and do not decide . . . whether suspicionless parole searches violate the Fourth Amendment." *Id.* at p. 1054. Five concurring judges would have held that the search did not violate the Fourth Amendment; three dissenting judges would have held that it did. *Id.* at 1062-76 (Trott, J., concurring); *id.* at 1082-97 (W. Fletcher, J., dissenting).

The disagreement among Ninth Circuit judges was on display again last month in *Moreno v. Baca*, 400 F.3d 1152, 2005 U.S. App. LEXIS 3739. In that case, a civil rights action under section 1983, the plaintiff alleged that sheriff's deputies deprived him of his constitutional rights when they arrested and searched him without cause. 2005 U.S. App. Lexis 3739, *1. At the time of the detention, the plaintiff was a parolee subject to a warrantless search condition. *Id.* at *4-*5. Despite this, the panel majority opined that the plaintiff's Fourth Amendment rights "clearly included the right to walk along a public sidewalk unmolested by law enforcement" (*id.* at *22) and that he "certainly had a legitimate expectation of privacy with respect to the contents of his pockets" (*id.* at *26). Regarding the level of suspicion required to justify the warrantless search of a parolee who has a search condition, the majority concluded:

> Taking into account the reduced privacy rights enjoyed by parolees and the State's interest in rehabilitating parolees and deterring crime, we hold that the Constitution requires that a law enforcement officer must, at minimum, have a reasonable suspicion that a parolee has engaged in criminal wrongdoing or violated his parole prior to arresting him or conducting a search of his person.

Id. at *31.

Although the judgment in *Moreno v. Baca* was unanimous, one judge criticized the above-quoted language as "a bit of dictum" and as legally incorrect. *Id.* at *55-*56, *61-*62 (Clifton, J., concurring in judgment). That judge, who had joined Judge Trott's concurring opinion in *United States v. Crawford*, 372 F.3d 1048, adhered to the view that "a law enforcement officer's search of a parolee's residence is reasonable so long as the

search is not 'arbitrary, capricious, or harassing.'" *Moreno v. Baca*, 2005 U.S. App. Lexis 3739, *55-*56 (Clifton, J., concurring in judgment), quoting *Crawford*, 372 F.3d at 1063 (Trott, J., concurring).

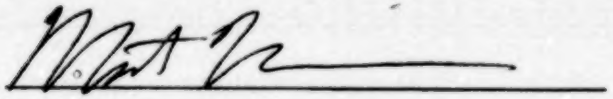
The instant case is well-suited to serve as a vehicle for resolving the conflict, because it starkly presents the issue whether the Fourth Amendment required that Officer Rohleder harbor a reasonable suspicion of criminal wrongdoing before he could search Mr. Samson's person. There is no issue in this case as to whether the officer *did*, in fact, harbor such suspicion; neither the prosecution nor the trial court asserted that such suspicion existed. Indeed, the officer admitted on the witness stand that he had no reason to suspect that Mr. Samson was doing anything illegal. As the Court of Appeal noted, "[t]he warrantless search was predicated entirely upon defendant's parole status." (Opn. 5.) This Court should grant certiorari in the instant case to decide the recurring question whether or not a parolee with a search condition may constitutionally be subjected to a warrantless search with no individualized suspicion of criminal wrongdoing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARTIN KASSMAN
(Counsel of Record)



Attorney for Petitioner
DONALD CURTIS SAMSON

Date: April 12, 2005

Filed 10/14/04

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FILED
Court of Appeal First Appellate District
OCT 14 2004
Diana Herbert, Clerk
By _____ Deputy Clerk

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD CURTIS SAMSON,

Defendant and Appellant.

A102394

(San Mateo County
Super. Ct. No. SC052426)

Following denial of defendant's motion to suppress evidence (Pen. Code, § 1538.5) gathered pursuant to a parole search and a trial before a jury, he was found guilty of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The trial court found that defendant committed a charged prior conviction (Pen. Code, § 1170.12, subd. (c)(1)), and served prior prison terms (Pen. Code, § 667.5, subd. (b)).[1] On appeal, he again contests the validity of the parole search, and claims that the trial court erred in its calculation of sentence credits. In a supplemental brief he has complained of the violation of his Sixth Amendment right to a jury trial due to the trial court's imposition of an upper term of imprisonment. We find that the search was lawful pursuant to a condition of defendant's parole, and any violation of his jury trial right by imposition of an upper term was not prejudicial, but the calculation of sentence credits

[1] All further statutory references are to the Penal Code.

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was in error. We therefore direct the trial court to amend the judgment to add three days of sentence credits, but otherwise affirm the judgment.

STATEMENT OF FACTS[2]

On the afternoon of September 6, 2002, Officer Alex Rohleder of the San Bruno Police Department observed "two adults and a little baby walking down the street." One of the adults was defendant, whom Officer Rohleder recognized "from a prior contact." The officer was aware that defendant was on parole and heard from other officers that he "might have a parolee at large warrant." The officer therefore parked his patrol vehicle and "made contact" with defendant.

Officer Rohleder asked defendant if "he had a warrant at that time." Defendant replied, "no, he didn't. He had already taken care of it." Defendant added that he "was in good standing with his parole agent." Rohleder determined that defendant was not subject to a parole warrant, but nevertheless "conducted a parolee search" as he waited for a cover officer. He knew that during a previous contact with South San Francisco officers defendant warned that the police "weren't going to take him back to prison," but neither defendant's conduct nor officer safety caused him to undertake the search. The sole reason for the search, according to Officer Rohleder, was that defendant was "on parole." He explained: "Because it's a condition of his parole. I believe that being [a] parolee, that he needs to make sure he's still obeying the laws. It's a privilege for him to be out here."[3] Officer Rohleder testified that he does not search all parolees "all the time," but does conduct parole searches "on a regular basis" unless he has "other work to do" or already "dealt with" the parolee. The officer intended to discharge defendant after the parole search "if he had nothing on him illegal."

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[2] Given that appellant has challenged only the propriety of the parole search and the sentence imposed, we will recite only the facts pertinent to the validity of the search, which were presented at the hearing on the motion to suppress.

[3] Appellant's condition of parole stated that he agreed to "search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause." "Such conditions are now automatic, and imposed on every parolee." (*People v. Lewis* (1999) 74 Cal.App.4th 662, 668.)

Officer Rohleder found a cigarette box in defendant's left breast pocket. Inside the box was a plastic baggie that contained methamphetamine. Defendant was immediately placed under arrest.

Officer Rohleder testified that he then asked defendant's companion, Deborah Watson, for permission to search her, and she agreed. Nothing was found in her possession, and she was not detained.

Watson testified for the defense that as she and defendant were walking to a friend's house with her three-year-old son, Officer Rohleder approached and asked defendant "if he had a warrant for his arrest." Defendant did not say anything to the officer. Rohleder told appellant to "put his hands up on the car," and remove his jacket. He searched the jacket, then searched defendant "again a second time." According to Watson, the officer did not ask permission to search her, but rather told her to empty her pockets, and asked if she had any weapons or drugs. Officer Rohleder "went through" Watson's "belongings on the top of the hood of the car," then told her to "go home."

DISCUSSION

I. The Validity of the Parole Search.

Defendant argues that the officer did not conduct a valid parole search. He makes a two-pronged argument: First, that the search was not justified by a reasonable "individualized suspicion" of criminal activity; and second, that the search was "arbitrary, capricious and harassing."

Established law contravenes defendant's contention that a parole search must be based upon reasonable suspicion of criminal activity by the parolee. "In *People* v. *Reyes* (1998) 19 Cal.4th 743 [], the court overruled a previous decision, *People* v. *Burgener* (1986) 41 Cal.3d 505 [], and held that an adult *parolee* subject to a search condition could be searched even if the searching officers did not have a reasonable suspicion that the parolee had violated or was planning to violate either the law or the conditions of parole. Subject to the same proviso from [*In re Tyrell J.* (1994) 8 Cal.4th 68] about arbitrary, capricious, or harassing searches, '[w]here the search is for a proper purpose, we hold that, even in the absence of particularized suspicion, a search conducted under the

auspices of a properly imposed parole search condition does not intrude on any expectation of privacy "society is 'prepared to recognize as legitimate.' " [Citations.]' [Citation.]" (*People v. Lewis, supra,* 74 Cal.App.4th 662, 667-668; see also *People v. Cervantes* (2002) 103 Cal.App.4th 1404, 1407-1408.) Thus, "reasonable suspicion is no longer a prerequisite to conducting a search of the subject's person or property. Such a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing," and does not exceed the scope of the consent. (*People v. Reyes, supra,* at p. 752; see also *People v. Lewis, supra,* at pp. 667-668; *People v. Reed* (1994) 23 Cal.App.4th 135, 141; *People v. Velasquez* (1993) 21 Cal.App.4th 555, 558.)

Despite defendant's protest that the majority opinion in *Reyes* "is incorrect" and contrary to the position taken by other courts, "[a]s an intermediate state appellate court, we, of course, are bound by decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 []; *People v. Superior Court (Persons)* (1976) 56 Cal.App.3d 191, 194 [].)" (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 952-953; see also *People v. Superior Court (Moore)* (1996) 50 Cal.App.4th 1202, 1211; *People v. Brackett* (1994) 25 Cal.App.4th 488, 501.) We therefore conclude that the parole search of defendant did not require a particularized suspicion of criminal activity. (*People v. Zichwic, supra,* at pp. 952-953.)

We turn to defendant's argument that the parole search was "arbitrary, capricious and harassing" under the standard articulated in *Reyes*. "A search is arbitrary 'when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee.' (*People v. Reyes, supra*, 19 Cal.4th at p. 754.) A search is a form of harassment when its motivation is a mere whim or caprice." (*People v. Cervantes, supra,* 103 Cal.App.4th 1404, 1408.) "It may be unreasonable ' "if made too often, or at an unreasonable hour, or if unreasonably prolonged." ' [Citation.]" (*People v. Zichwic, supra,* 94 Cal.App.4th 944, 951, quoting from *People v. Reyes, supra,* at pp. 753-754; see also *People v. Bremmer* (1973) 30 Cal.App.3d 1058, 1062.)

We find nothing arbitrary or capricious in the search. "It is only when the motivation for the search is wholly arbitrary, when it is based merely on a whim or caprice or when there is no reasonable claim of a legitimate law enforcement purpose, e.g., an officer decides on a whim to stop the next red car he or she sees, that a search based on a [parole] search condition is unlawful." (*People v. Cervantes, supra,* 103 Cal.App.4th 1404, 1408.) Officer Rohleder did not detain defendant indiscriminately or at his whim, but rather recognized him as a parolee, and thought he may be subject to an outstanding "parolee at large warrant." The lawful basis for the search did not dissipate when the officer learned the warrant was not active. Nor was the officer compelled to rely upon "officer safety" to undertake the search.[4] The warrantless search was predicated entirely upon defendant's parole status, not the warrant or the need for officer safety. And a legitimate law enforcement purpose for a parole search was expressed by Officer Rohleder: to determine whether defendant, as a parolee, was "still obeying the laws." If defendant "had nothing on him illegal," the officer intended to release him. The testimony by Officer Rohleder that he customarily searches identified parolees does not demonstrate arbitrariness, and indicates that the search was not conducted by the officer for the purpose of harassment or due to any personal animosity toward defendant. (*People v. Reed, supra,* 23 Cal.App.4th 135, 143.) Finally, the record shows that the search was not unreasonable in duration or the circumstances of its execution. We therefore conclude that the search of defendant was lawful.

II. The Calculation of Sentence Credits.

Defendant also argues that he is entitled to "an additional 3 days" of sentence credits, for a total of 342 days. The Attorney General concedes that an error in the calculation of sentence credits was committed, and upon review of the record we agree.

III. The Imposition of an Upper Term.

We have granted defendant the opportunity to submit a supplemental brief to present the argument that under the recent United States Supreme Court decision in

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[4] In fact, Rohleder discounted officer safety as a reason for the search.

Blakely v. Washington (2004) 542 U.S. ___ [159 L.Ed.2d 403, 124 S.Ct. 2531], (*Blakely*), the trial court erred by imposing an upper term for his possession of methamphetamine conviction without an admission or supporting finding made by the jury beyond a reasonable doubt. He maintains that under the *Blakely* opinion the jury verdict, "standing alone," did not authorize the upper term selected as a sentence choice by the trial court. He adds that, "California's sentencing scheme required the trial court to impose the middle term, unless it justified a departure by reference to factors other than those necessarily found by the jury – just as the Washington statutory scheme involved in *Blakely* required an 'exceptional' sentence to be justified by reference to factors other than those used in computing the standard range sentence." Therefore, he complains that imposition of upper term upon him violated his constitutional rights as defined in *Blakely*.[5]

We first dispose of respondent's contention that defendant "forfeited" any claim of *Blakely* error by failing to "request a jury trial" to determine the existence of a fact that may increase his sentence. "Claims of error relating to sentences 'which, though otherwise permitted by law, were imposed *in a procedurally* or factually *flawed manner*' are waived on appeal if not first raised in the trial court." (*People v. Brach* (2002) 95 Cal.App.4th 571, 577; see also *People v. Breazell* (2002) 104 Cal.App.4th 298, 304-305.) According to a fundamental principle of appellate procedure, "with certain exceptions, an appellate court will not consider claims of error that could have been—but were not—raised in the trial court." (*People v. Vera* (1997) 15 Cal.4th 269, 275.) " '[A]n appellate court should not take notice of matters not first presented to and considered by the trial court, where to do so would unfairly permit "one side to press an issue or theory on appeal that was not raised below." [Citation.]' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 171.) " 'Generally speaking, the rationale underlying the rule requiring

[5] We are of course aware that the effect of *Blakely, supra*, 542 U.S. __ [124 S.Ct. 2531], on California sentencing law is already before the California Supreme Court in *People v. Black*, review granted July 8, 2004, S126182, and *People v. Towne*, review granted June 18, 2004, S125677.

objection below as a prerequisite to complaint on appeal regarding some error by the trial court is predicated on the premise that, in its absence, the People would be deprived of the opportunity to cure the defect in the trial court and the defendant would be allowed to gamble on a favorable result—secure in the knowledge that if he did not prevail there, he would be able to prevail on appeal. . . .' [Citation.]" (*People v. Zamarron* (1994) 30 Cal.App.4th 865, 870; see also *People v. McClellan* (1993) 6 Cal.4th 367, 377.) The waiver doctrine also seeks to " ' "encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided . . . ." ' [Citation.]" (*People v. Peel* (1993) 17 Cal.App.4th 594, 600.)

"The California Supreme Court has repeatedly held" that even "constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal." (*People v. Rudd* (1998) 63 Cal.App.4th 620, 628, citing *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Padilla* (1995) 11 Cal.4th 891, 971; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Garceau* (1993) 6 Cal.4th 140, 173-174; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10.) " ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. omitted; see also *People v. Rudd, supra,* at p. 629.)

However, "Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera, supra,* 15 Cal.4th 269, 276.) Further, failure to object does not prevent correction or vacation of an "unauthorized sentence" on appeal. (*In re Birdwell* (1996) 50 Cal.App.4th 926, 931.) "An unauthorized sentence is a narrow exception to the requirement that the parties raise their claims in the trial court to preserve the issue for appeal." (*People v. Breazell, supra,* 104 Cal.App.4th 298, 304.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance

in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*People v. Scott* (1994) 9 Cal.4th 331, 354; see also *People v. Breazell, supra,* at p. 304; *People v. McGee* (1993) 15 Cal.App.4th 107, 117.) "Claims involving unauthorized sentences or sentences entered in excess of jurisdiction can be raised at any time." (*People v. Andrade* (2002) 100 Cal.App.4th 351, 354; see also *People v. Turner* (2002) 96 Cal.App.4th 1409, 1415.) A related exception to the waiver rule is that it "is generally not applied when the alleged error involves a pure question of law, which can be resolved on appeal without reference to a record developed below." (*People v. Williams* (1999) 77 Cal.App.4th 436, 460.)

In the present case defendant has presented a claim of deprivation of the fundamental constitutional rights to jury trial and proof beyond a reasonable doubt. (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) The constitutional challenge raised by defendant is an issue of law that we may decide without reference to the particular sentencing record developed in the trial court. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 815.) And if his position is found to have merit, the sentence may not lawfully be imposed under any circumstances without a jury trial, and as an unauthorized component of his disposition may be corrected on appeal despite the lack of an objection in the trial court. (*Ibid.*; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534; *People v. Chambers* (1998) 65 Cal.App.4th 819, 823; *In re Paul R.* (1996) 42 Cal.App.4th 1582, 1590; *People v. Sexton* (1995) 33 Cal.App.4th 64, 69.) Finally, *Blakely* was decided after defendant was sentenced, and therefore he had no reason to object in the face of previously established law that unfailingly declared a defendant has no constitutional right to a jury trial in connection with the imposition of an upper term of imprisonment. (See *People v. Ochoa* (2004) 121 Cal.App.4th 1551, 1565; *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *People v. Ramos* (1980) 106 Cal.App.3d 591, 605-606; *People v. Williams* (1980) 103 Cal.App.3d 507, 510; *People v. Betterton* (1979) 93 Cal.App.3d 406, 410-411; *People v. Nelson* (1978) 85 Cal.App.3d 99, 102-103; *U.S. v. Harrison* (8th Cir.

2003) 340 F.3d 497, 500.) We cannot find that he voluntarily and intelligently relinquished a known right, or forfeited his right to object on appeal by failing specifically to raise an objection in a timely fashion. We therefore conclude that defendant has not waived his right to complain of denial of the right to a jury trial under *Blakely*, and despite the lack of an objection below elect to address his constitutional claims on their merits. (*People v. Ochoa, supra*, at p. 1565; *People v. Peck* (1996) 52 Cal.App.4th 351, 362, fn. 5; see also *People v. Marshall* (1996) 13 Cal.4th 799, 831-832; *People v. Ashmus, supra*, 54 Cal.3d 932, 976; *In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 537; *People v. Williams* (1998) 61 Cal.App.4th 649, 657.)

In *Blakely*, the United States Supreme Court revisited the rule articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." (*Blakely, supra*, 124 S.Ct. 2531, 2536, italics added.) At issue in *Blakely* was whether the determinate sentencing procedure in the State of Washington deprived the defendant of his "federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." (*Id.* at p. 2536.) The petitioner entered a guilty plea to second-degree kidnapping of his estranged wife in which he admitted domestic violence and use of a firearm, but "no other relevant facts." (*Id.* at pp. 2534-2535.) Under the Washington Criminal Code (§§ 9A.40.030(3); 9A.20.021(1)(b)), second-degree kidnapping was designated a class B felony that carried a maximum statutory sentence of 10 years. (*Blakely, supra*, at p. 2535.) The governing Washington sentencing guidelines further limited the presumptive "standard range" to 49-53 months, but authorized the judge to impose a sentence above the specified range, although below the 10-year maximum, upon a finding by a preponderance of the evidence of "substantial and compelling reasons justifying an exceptional sentence." (*Ibid.*, citing Wash. Rev. Code § 9.94A.120(2)). At the sentencing proceeding, an "exceptional sentence" of 90 months was imposed, based upon the trial judge's finding that the petitioner used "deliberate cruelty" in the commission of the offense, which was one of the statutorily

enumerated grounds for departure from the standard sentencing range. (*Blakely, supra*, at p. 2535.)[6]

The court in *Blakely* reaffirmed the commitment articulated in its prior decisions in *Apprendi, supra*, 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, "to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." (*Blakely, supra*, 124 S.Ct. 2531, 2538-2539.) The Sixth Amendment, declared the court, "is not a limitation on judicial power, but a reservation of jury power." (*Id.*, at p. 2540.) The court further observed that "*Apprendi* carries out this design by ensuring that the judges' authority to sentence derives wholly from the jury's verdict." (*Id.*, at p. 2539.)

The court in *Blakely* operated from the essential conclusion reached in both its *Apprendi* and *Ring* decisions that a defendant's constitutional rights have been violated when a judge "impose[s] a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi, supra*, at 491-497, 120 S.Ct. 2348; *Ring, supra*, at 603-609, 122 S.Ct. 2428." (*Blakely, supra*, 124 S.Ct. 2531, 2537.) The notion advocated by the State in *Blakely* "that there was no *Apprendi* violation because the relevant 'statutory maximum' is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b)," and "no exceptional sentence may exceed that limit," was rejected as contrary to those "clear" precedents. (*Blakely, supra*, 124 S.Ct. 2531, 2537.) Instead, the court defined "the 'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow,

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[6] Under the Washington Sentencing Reform Act, the factors that may be relied upon to justify a finding of an exceptional sentence are listed, but the list is illustrative not exhaustive. A factor may be taken into consideration to impose an exceptional sentence only if it is not already taken into account in the calculation of the standard range sentence for the offense. (*Blakely, supra*, 124 S.Ct. 2531, 2535.)

the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid*; see also *United States v. Ameline* (9th Cir. 2004) 376 F.3d 967, 975.)

The court then concluded: "The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, '[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense,' [citation], which in this case included the elements of second-degree kidnapping and the use of a firearm, see §§ 9.94A.320, 9.94A.310(3)(b). Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See § 9.94A.210(4). The 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)." (*Blakely, supra*, 124 S.Ct. 2531, 2537-2538, fn. omitted.) "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Blakely, supra,* at p. 2538.) "Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." (*Blakely, supra*, at p. 2538, fn. 8.)

Without deciding that defendant's constitutional rights pursuant to the *Blakely* opinion were violated, we find that he did not suffer prejudice from the imposition of the upper term upon him without a separate finding by the jury of aggravating circumstances beyond a reasonable doubt. We do not, as defendant urges, consider the denial of *Blakely*

jury trial rights during sentencing proceedings to be of such fundamental, structural magnitude to require reversal "without regard to prejudice." And we conclude under a harmless error analysis that defendant would have been sentenced to an upper term even without the trial court's finding of any aggravating factors in violation of *Blakely*.

In *Arizona v. Fulminante* (1991) 499 U.S. 279, "a majority of the high court, in discussing the applicable harmless error standard for constitutional errors, distinguished 'trial error,' that is, an error which 'occur[s] during the presentation of the case to the jury,' from 'structural defects,' such as denial of a public trial, which 'affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself.' The former errors are subject to *Chapman* analysis (see *Chapman* v. *California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824, 24 A.L.R.3d 1065] [error or deprivation must be shown harmless beyond reasonable doubt]), whereas the latter errors are deemed reversible per se." (*People v. Woodward* (1992) 4 Cal.4th 376, 387.) "There is a strong presumption any error falls within the [former] category, and it is the rare case in which a constitutional violation will not be subject to harmless error analysis." (*People v. Marshall, supra,* 13 Cal.4th 799, 851.) "In only a few cases has the Supreme Court found a constitutional violation which is not subject to harmless error analysis." (*People v. Evans* (1998) 62 Cal.App.4th 186, 194.)

The United States Supreme Court has " 'recognized that "most constitutional errors can be harmless." [Citation.] "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." [Citation.] Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." ' " (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1210, citing *Johnson v. United States* (1997) 520 U.S. 461, 468 [].) " 'The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has

been satisfied and the judgment should be affirmed.' " (*People v. Flood* (1998) 18 Cal.4th 470, 492, citing *Rose v. Clark* (1986) 478 U.S. 570, 579.)

We recognize that where the right to a jury trial is " 'altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.' [Citation.]" (*People v. Avila* (1995) 35 Cal.App.4th 642, 656, fn. omitted; see also *People v. Collins* (2001) 26 Cal.4th 297, 312-313.) "Where demonstration of prejudice is ' "a practical impossibility, prejudice must necessarily be implied." ' [Citation.]" (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1333.)

But here, the denial of the rights to a jury trial to proof beyond a reasonable doubt are only associated with the finding of one or perhaps two among many aggravating circumstances that contributed to the selection of the upper term, not the structure of the trial itself that resulted in the guilty verdict and imposition of sentence. Defendant was tried and found guilty by a fairly selected, impartial jury. He was represented by counsel and received a full opportunity to elicit evidence and offer argument to an impartial judge to support imposition of a middle or lower term. Placed in context, the lack of a jury finding of an aggravating circumstance does not rise to the level of an error that automatically requires reversal of an otherwise valid sentence. (See *Rose v. Clark, supra,* 478 U.S. 570, 579; *People v. Evans, supra,* 62 Cal.App.4th 186, 197.) The nature of the error also permits a quantitative assessment of prejudice in the context of the evidence presented in order to determine whether the error was harmless. (*Arizona v. Fulminante, supra,* 499 U.S. 279, 307-308; *People v. Marshall, supra,* 13 Cal.4th 799, 851.) We find that any sentencing error under *Blakely* is not a structural defect that demands automatic reversal. (See *People v. Epps* (2001) 25 Cal.4th 19, 29; *People v. Vera, supra,* 15 Cal.4th 269, 278; *People v. Marshall, supra,* at pp. 851-852.) Rather, we follow the standard of review for federal constitutional errors (*Chapman v. California, supra,* 386 U.S. 18, 24), and must reverse the sentence unless it appears beyond a reasonable doubt that the assumed error did not contribute to the verdict. (*People v. Neal* (2003) 31 Cal.4th 63, 86;

People v. Carter (2003) 30 Cal.4th 1166, 1221-1222; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

Our review of the record discloses that to impose the upper term upon defendant the trial court properly relied upon numerous aggravating factors that do not fall within the reach of the right to a jury trial articulated in *Blakely*. Defendant's record of prior offenses, including multiple crimes of violence, is lengthy and unrelenting. As aggravating factors to support the sentence choice, the court cited – in addition to lack of remorse and failure to take advantage of treatment programs – defendant's "record of prior convictions, some of which involve violent conduct; his prior service of prison terms; his lack of satisfactory performance while on parole;" and his "prior conduct while on parole, including five parole violations." No mitigating factors were cited by the court or mentioned in the probation report.

The aggravating factors that relate to defendant's prior convictions and other recidivist conduct did not implicate his right to a jury trial under the current state of the law. In *Apprendi* the court specifically declared that based on its prior decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. 466, 490, italics added; see also *People v. Taylor* (2004) 118 Cal.App.4th 11, 28; *People v. Superior Court* (*Andrades*) (2003) 113 Cal.App.4th 817, 831; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1314.) Thus, "[b]y its terms, the holding of *Apprendi* does not apply to 'the fact of a prior conviction . . . .' [Citation.]" (*People v. Taylor, supra,* at p. 28.) "*Apprendi* was absolutely clear in excepting the fact of prior convictions from its new rule." (*Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 154.)

Nothing articulated in the *Blakely* opinion casts doubt upon the exclusion in *Apprendi* of prior conviction allegations from the constitutional right to jury trial, and the California Supreme Court has steadfastly declared that neither the federal nor state constitutions confer the right to have a jury determine any factual issues relating to prior

convictions alleged for purposes of sentencing enhancement. (*People v. Epps, supra,* 25 Cal.4th 19, 23; *People v. Kelii* (1999) 21 Cal.4th 452, 455; *People v. Vera, supra,* 15 Cal.4th 269, 277; *People v. Wiley* (1995) 9 Cal.4th 580, 585; *People v. McGee* (2004) 115 Cal.App.4th 819, 828.) Even in the aftermath of *Apprendi* our high court held: "The right, if any, to a jury trial of prior conviction allegations derives from sections 1025 and 1158, not from the state or federal Constitution." (*People v. Epps, supra,* at p. 23; see also *People v. Belmares* (2003) 106 Cal.App.4th 19, 27.)

The exception has also been found to apply not only to the fact of a prior conviction, but to "an issue of recidivism which enhances a sentence and is unrelated to an element of a crime." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223; see also *People v. Taylor, supra,* 118 Cal.App.4th 11, 28-29.) A narrow reading of the *Apprendi* language to apply to nothing more than the "fact of a prior conviction" fails to consider the bases for the exception, and "takes that language out of its context." (*People v. Thomas, supra,* at p. 216.) A reason for the exemption of prior convictions from the scope of the jury trial requirement for increased sentences, explained the court, is that "procedural safeguards attached to any 'fact' of prior conviction." (*Apprendi, supra,* 530 U.S. 466, 488; see also *People v. Lee, supra,* 111 Cal.App.4th 1310, 1314.) The court further emphasized that the fact of a prior conviction " 'does not relate to the commission of the offense.' " (*Apprendi, supra,* at pp. 488, 496, quoting *Almendarez-Torres v. United States, supra,* 523 U.S. 224, 230, 244; see also *People v. Taylor, supra,* at p. 29.) And finally, the court "excepted the fact of a prior conviction from this holding, because of the long tradition allowing sentencing judges to consider the defendant's recidivism." (*People v. Bowden* (2002) 102 Cal.App.4th 387, 392, italics omitted; see also *Jones v. United States* (1999) 526 U.S. 227, 249.) "[R]ecidivism 'is as typical a sentencing factor as one might imagine.' " (*Castillo v. United States* (2000) 530 U.S. 120, 126.)

"[C]ourts have construed *Apprendi* as requiring a jury trial except as to matters relating to 'recidivism.' Courts have not described *Apprendi* as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of

'recidivism.' [Citations.] Appellate courts have held that *Apprendi* does not require full due process treatment to recidivism allegations which involved elements merely beyond the fact of conviction itself." (*People v. Thomas, supra,* 91 Cal.App.4th 212, 221-222; see also *People v. Belmares, supra,* 106 Cal.App.4th 19, 27-28.)

Thus, in *People v. Thomas, supra,* 91 Cal.App.4th 212, the court concluded that under *Apprendi* the defendant was not entitled to a jury trial on two prior prison term allegations. Following an analysis of *Apprendi* and its predecessor *Almendarez-Torres v. United States, supra,* 523 U.S. 224, 226, the court declared: "With the foregoing legal analysis in mind, we reach the following conclusions. In terms of recidivism findings that enhance a sentence and are unrelated to the elements of a crime, *Almendarez-Torres* is the controlling due process authority. *Almendarez-Torres* does not require full due process treatment of an issue of recidivism which enhances a sentence and is unrelated to an element of a crime. *Apprendi* did not overrule *Almendarez-Torres*. The language relied upon by defendant in *Apprendi*, '[o]ther than the fact of a prior conviction,' refers broadly to recidivism enhancements which include section 667.5 prior prison term allegations." (*Id.*, at pp. 222-223; see also *People v. Taylor, supra,* 118 Cal.App.4th 11, 28-29.)

We similarly conclude that the trial court in the case before us did not violate defendant's jury trial rights by finding aggravating circumstances based upon his recidivism. Defendant's prior prison terms and performance on parole arose out of his prior convictions previously found by the trier of fact or admitted by him, may be established by review of court records, and did not relate to commission of the current offense. Therefore, the aggravating circumstances relating to defendant's recidivism were properly relied upon by the court to impose an upper term without affording defendant the right to a jury trial. (*People v. George* (2004) 122 Cal.App.4th 419 [Sept. 15, 2004, D.A.R. 11568, 11573.) We further conclude that defendant's prior convictions, prison terms, and poor performance on parole justified the selection of an upper term, which we are convinced the trial court certainly would have imposed even without finding any facts that require a jury trial under *Blakely*. "California courts have long held

that a single factor in aggravation is sufficient to justify a sentencing choice, including the selection of an upper term . . . ." (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.) Here, a multitude of aggravating circumstances established by persuasive evidence were not offset by any mitigating circumstances. Thus, even if the trial court erred in finding aggravating factors, the decision to impose the upper term was constitutionally valid and not prejudicial to defendant. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1263-1264; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1782-1783.)

DISPOSITION

Accordingly, the trial court is directed to correct the abstract of judgment to award defendant 342 days of sentence credits rather than 339 days, and to forward the corrected abstract of judgment to the Department of Corrections. In all other respects the judgment is affirmed.

Swager, J.

We concur:

Marchiano, P. J.

Margulies, J.

RESPONSE REQUEST

(18) ORIGINAL

ORIGINAL

No. 04-9728

SUPREME COURT U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

DONALD CURTIS SAMSON,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourth Amendment permit the search of a parolee on a public street to determine whether he is complying with the conditions of his parole?

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	3
A. The California Rule Does Not Conflict With The Authorities Cited By Petitioner	3
B. This Court's Jurisprudence Supports The California Rule	7
1. The Issue	7
2. The Balance Of Interests	7
3. The Parolee's Interest	8
4. The State's Interest	9
5. Striking The Balance	10
C. Summary	13
CONCLUSION	14

TABLE OF AUTHORITIES

Page

Cases

Commonwealth v. Hughes
575 Pa.447, 836 A.2d 893 (2003) 5

Ewing v. California
538 U.S. 11, 26 (2003) 9

Florida v. J.L.
529 U.S. 266 (2000) 12

Griffin v. Wisconsin
483 U.S. 868 (1987) 3, 11, 12, 13

Knox v. Smith
342 F.3d 651 (6th Cir. 2003) 6

Minnesota v. Dickerson
508 U.S. 366 (1993) 11

Moreno v. Baca
400 F.3d 1152 (9th Cir. 2005) 4

Penn. Bd. of Prob. and Parole v. Scott
524 U.S. 357, 365 (1998) 8, 9

People v. Reyes
19 Cal.4th 743, 80 Cal.Rptr.2d 734, 968 P.2d 445 (1998) 3, 5, 6, 8, 12

People v. Sanders
31 Cal.4th 318, 332, 2 Cal.Rptr.3d 630, 73 P.3d 496 (2003) 5

State v. Bonner
811 So.2d 1151 (La.App.2002) 5

Terry v. Ohio
392 U.S. 1 (1968) 7, 11

United States v. Carnes
309 F.3d 950 (6th Cir. 2002) 5

United States v. Crawford
372 F.3d 1048, 1071 (9th Cir. 2004) 4, 6, 9, 10

TABLE OF AUTHORITIES (continued)

	Page
United States v. Loney 331 F.3d 516 (6th Cir. 2003)	5
Unites States v. Knights 534 U.S. 112, 118-119 (2001)	3, 8, 10, 11, 13
Wyoming v. Houghton 526 U.S. 295, 300 (1999)	8
Constitutional Provisions	
United States Fourth Amendment	3, 4, 7
Statutes	
California Penal Code § 3000 (a)(1)	9

IN THE SUPREME COURT OF THE UNITED STATES

No. 04-9728

DONALD CURTIS SAMSON,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

STATEMENT

The evidence adduced at the suppression hearing (S.H.) reflected that at 5:34 p.m. on September 6, 2002, San Bruno Police officer Alex Rohleder saw petitioner Donald Curtis Samson walking down the street with a woman and baby in the vicinity of Angus Avenue and Mastick Street. S.H. 20-21. Rohleder recognized petitioner from a "prior contact," involving an arrest for an "incident" with his girlfriend. S.H. 21, 25. At that time petitioner said the "police weren't going to take me back to prison." S.H. 34. On the present occasion, "under the impression that he might have a parolee at large warrant," the officer requested permission to speak with petitioner. S.H. 21. Asked whether a parole warrant was outstanding against him, petitioner replied that "he had already taken care of it. And he was released from custody."

S.H. 21-22.

Officer Rohleder radioed his dispatcher and was informed that petitioner was on parole but that the warrant was no longer outstanding. S.H. 22, 26-27, 28, 52. Nevertheless, the officer decided to search petitioner "[b]ecause it's a condition of his parole. I believe that being [a] parolee, that he needs to make sure he's still obeying the laws." S.H. 28. Although Rohleder does not "go after [all parolees] all the time," S.H. 29, he does search them on a "regular basis." S.H. 35. If a "parolee or person [is] subject to [a] search or seizure [condition], I would search them. . . ." S.H. 36.

Rohleder's search of petitioner disclosed methamphetamine in a plastic baggie secreted in a cigarette box in his left breast pocket. S.H. 22-23. Petitioner was then arrested. S.H. 52.

Following the denial of his motion to suppress on December 13, 2002, C.T. 43, a San Mateo County jury convicted petitioner on March 24, 2003. C.T. 88, 158. On April 21, 2003, the trial court sentenced petitioner to state prison for seven years, based on his current conviction and a prior felony conviction. C.T. 89, 174, 176.

On October 14, 2004, the California Court of Appeal, First Appellate District, affirmed the judgment of conviction. Pet. App. A. On January 12, 2005, the California Supreme Court denied review. Pet. App. B.

ARGUMENT

In *People v. Reyes*, 19 Cal. 4th 743, 80 Cal. Rptr. 2d 734, 968 P.2d 445 (1998), the California Supreme Court held that the search of a parolee, who is "on notice that his activities are being routinely and closely monitored," "may be reasonable despite the absence of particularized suspicion." *Id.* at 753. Petitioner submits that this rule is constitutionally unacceptable, arguing that reasonable suspicion should be required to justify a parole search. He further argues that this Court must decide this issue to resolve what he perceives to be a conflict in the decisional law on this question. Petitioner is incorrect in both respects. The California rule is consistent with this Court's Fourth Amendment jurisprudence, and no conflict requires resolution by this Court.

A. The California Rule Does Not Conflict With The Authorities Cited By Petitioner

Petitioner's claim that the California rule allowing suspicionless searches of parolees "conflicts with other states' courts and federal courts of appeals," Pet. at 8, is either inaccurate or beside the point. First, *Reyes* does not conflict with this Court's decisions in *Griffin v. Wisconsin*, 487 U.S. 868 (1987) or *United States v. Knights*, 534 U.S. 112 (2001). Both cases held that the warrantless search of a probationer's house was supported by reasonable suspicion.

Neither case held that it was required, and *Knights* specifically declined to "address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." *Knights*, 534 U.S. at 120 n.6. Perhaps more importantly, because both cases involved the searches of houses, neither addressed the question whether the suspicionless search of a parolee's person was reasonable under the Fourth Amendment.

Decisional law of the Court of Appeals for the Ninth Circuit does not conflict with *Reyes*. In *United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004) (en banc), referring to the suspicionless parole search of a house, the court "assume[d] for purposes of our decision, [but need not and do not decide,] that the parole search was unlawful." *Id.* at 1053. The suspicionless parole search of a person was not at issue. Significantly, five judges concluded that the suspicionless search of the house was permissible. *Id.* at 1062-1076. The three dissenters who believed the search violated the Fourth Amendment based their conclusion on the fact that the parole search condition did not permit a search for a pre-parole offense. *Id.* at 1082-1097.

In *Moreno v. Baca*, 400 F.3d 1152 (9th Cir. 2005), the court said in dictum that reasonable suspicion was necessary to justify a parole search. *Id.* at 1163. However, the court *held* that the parole search rationale was unavailable to

uphold the search because the officers did not know of the suspect's parole status until after the conclusion of the search. *Id.* at 1164-1166, 1168. Under California law, the result would be the same, for the California Supreme Court has held that the "police cannot justify an otherwise unlawful search of a residence because, unbeknownst to the police, a resident of the dwelling was on parole and subject to a search condition." *People v. Sanders*, 31 Cal. 4th 318, 332, 2 Cal. Rptr. 3d 630, 73 P.3d 496 (2003). For these reasons, no authoritative decision of the Ninth Circuit conflicts with *Reyes*.

Nor do petitioner's other authorities support his claim of conflict. *United States v. Loney*, 331 F.3d 516 (6th Cir. 2003), and *United States v. Carnes*, 309 F.3d 950 (6th Cir. 2002), both involved the search of the parolee's home. Additionally, the parole condition in each case differed markedly from that approved by *Reyes*. The Ohio parole condition at issue in *Loney* required "reasonable grounds" to justify a search. 331 F.3d at 518. Likewise, in *Carnes*, the court found that the parole agreement did not allow "police to be able to search [the parolee] without probable cause or a warrant." 309 F.3d at 963.

Both *State v. Bonner*, 811 So.2d 1151 (La.App.2002), and *Commonwealth v. Hughes*, 575 Pa. 447, 836 A.2d 893 (2003), involved the search of a dwelling. Consequently, they do not

conflict with the rule allowing a suspicionless search of a parolee's person.

Finally, *Knox v. Smith*, 342 F.3d 651 (6th Cir. 2003), involved the arrest of a parolee pursuant to a warrant. The court expressed no opinion concerning the warrantless search of a parolee in a public place.

Petitioner's suggestion that the decisional law of other states conflicts with *Reyes* is incorrect for a more fundamental reason. Petitioner's claim that the search was unlawful is, ultimately, a challenge to the California parole system and its operating procedures. Because each State is different, its institutions, including its parole system, must reflect those differences in a democratic society. California has the nation's highest rate of recividism. *United States v. Crawford,* 372 F.3d at 1069 (Trott, J., concurring). The operation of the parole systems in Ohio, Pennsylvania, Louisiana, Illinois, Michigan and any other state thus has limited relevance in determining the utility and appropriateness of the procedures employed in California in addressing the "overwhelming" task of managing its parolees. The *Reyes* rule, which allows suspicionless parole searches, but forbids those which are arbitrary, capricious, or intended to harass, does not conflict with this Court's Fourth Amendment jurisprudence and serves California's vital need to supervise its parolees. Consequently, the grant of a writ of certiorari would be inappropriate.

B. This Court's Jurisprudence Supports The California Rule

1. The Issue

To begin with, it must be emphasized that petitioner is challenging only the search of a parolee's person in the absence of suspicion that he or she was about to commit an offense. Petitioner does not, because he cannot, contend that suspicionless searches of a parolee's home or car offend the Fourth Amendment. Subjected to a search of his person on a public street, petitioner is without standing to make such an argument.

Second, petitioner apparently does not contend that reasonable suspicion is necessary to justify the detention of a parolee. Because that quantum of suspicion suffices to permit the detention of a citizen who is not a parolee, *Terry v. Ohio*, 392 U.S. 1 (1968), any similar requirement as applied to a parolee would render his parole status meaningless in justifying the reasonableness of his detention. Consequently, it is not disputed by petitioner that a suspicionless detention of a parolee is permissible under the Fourth Amendment.

2. The Balance Of Interests

"[T]he reasonableness of a search is determined 'by assessing on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to

which it is needed for the promotion of legitimate governmental interests.'" *Unites States v. Knights*, 534 U.S. 112, 118-119 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). The status as a parolee subject to search "informs both sides of the balance." *United States v. Knights*, 534 U.S. at 119.

3. The Parolee's Interest

A parolee enjoys a liberty interest limited by the reasonable conditions of the parole. "Parole is a 'variation on imprisonment of convicted criminals,' [citation], in which the State accords a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of release. In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements." *Penn. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 365 (1998). "As a convicted felon still subject to the [California] Department of Corrections, a parolee has conditional freedom – granted for the specific purpose of monitoring his transition from inmate to free citizen." *People v. Reyes*, 19 Cal. 4th at 752, 80 Cal. Rptr. 2d at 739, 968 P.2d at 450. The parole search condition, intended to ensure that the parolee corrects his behavior and to protect society from future criminal violations, *United States v. Knights*, 534 U.S. at 119; *People v. Reyes*, 19 Cal. 4th 750, 80

Cal. Rptr. 2d at 738, 968 P.2d at 751, "significantly diminished [petitioner's] reasonable expectation of privacy." *United States v. Knights*, 534 U.S. at 120.

4. The State's Interest

On the State's side of the balance, the need to manage its parole system effectively is "overwhelming." *Penn. Bd. of Prob. and Parole v. Scott*, 524 U.S. at 365. The California Legislature has determined that "the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the supervision of and surveillance of parolees. . . ." Cal. Pen. Code § 3000 (a)(1). "Parole is first and foremost about supervising and controlling people who have demonstrated a propensity to break the law and for whom the State still has a responsibility to constrain and to mentor in connection with public safety." *United States v. Crawford*, 372 F.3d at 1071 (Trott, J., concurring.)

The difficulty attending the rehabilitation of parolees is exacerbated by the rate of recidivism. As this Court recently noted, "approximately 67 percent of former inmates released from state prisons were charged with at least one 'serious' new crime within three years of their release." *Ewing v. California*, 538 U.S. 11, 26 (2003). In California, 70 percent of the paroled felons reoffend within 18 months-

the highest recidivism rate in the nation. *United States v. Crawford*, 372 F.3d at 1069 (Trott, J., concurring). "And [parolees] have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because [parolees] are aware that they may be subject to supervision and face revocation of [parole] and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply. . . ." *United States v. Knights*, 534 U.S. at 120.

Furthermore, although probationers and parolees are often regarded as comparable in terms of the need for supervision, they are, in fact, quite different. "[A]s distinguished from those not convicted of anything, those convicted of mere misdemeanors and either jailed or not jailed, and those convicted of felonies but not imprisoned for lengthy periods, parolees are persons deemed to have acted more harmfully than anyone else except those felons not released on parole." *United States v. Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring).

5. Striking The Balance

This balance of competing interests – the parolee's greatly diminished expectations of privacy and the State's need to supervise a person who was, and likely remains, a threat to society – justifies California's rule permitting

suspicionless searches of parolees' persons. Petitioner does not contend that a warrant or probable cause is necessary for such a search; *United States v. Knights*, 534 U.S. 112, and *Griffin v. Wisconsin*, 483 U.S. 868, foreclose such a claim. Rather, petitioner urges that the search of a parolee's person must be justified by reasonable suspicion. The necessity of such suspicion would strike an inappropriate balance of the competing interests.

Nonconsensual street encounters between police and citizens are generally governed by the reasonable suspicion standard announced in *Terry v. Ohio*, 392 U.S. 1. Thus, reasonable suspicion that a person is about to commit a crime justifies his detention; reasonable suspicion that he has a weapon justifies his search. Under petitioner's view of the law, a parolee would receive virtually as much protection from the Fourth Amendment as a citizen who was not on parole. The only difference would be the circumstance in which the officer had reasonable suspicion to believe that the person under investigation possessed incriminating evidence other than a weapon. In that situation, the non-parolee could not be searched, *Minnesota v. Dickerson*, 508 U.S. 366 (1993), but, petitioner submits, the parolee properly could be searched. Such a *de minimus* difference is wholly inadequate to serve the compelling state interest in the supervision of parolees.

As the Court has noted in discussing the compelling need for effective probation supervision, the goals of

rehabilitation and protection of the community (both of which are typically identified as the objectives of probation and parole) "require and justify the exercise of supervision to assure that the [probation or parole] restrictions are in fact observed. Recent research suggests that more intensive supervision can reduce recidivism. . . ." *Griffin v. Wisconsin*, 483 U.S. at 875. By contrast, petitioner's position would result in less, not more, supervision. To give but one example, the uncorroborated tip of an anonymous informant, does not amount to reasonable suspicion. *Florida v. J.L.*, 529 U.S. 266, 271 (2000). A parole agent or police officer, receiving an anonymous tip of wrongdoing by a parolee, would be powerless to investigate by the simple expedient of a search. True, the agent or officer could seek corroboration, but by the time the tip had been confirmed, the parolee may have vanished, secreting or disposing of his incriminating evidence.

As the California Supreme Court assessed the competing interests in *People v. Reyes*, "[t]he level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored. Moreover, the purpose of the search is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches." 19 Cal. 4th at 753, 80 Cal. Rptr. 2d at 740, 968 P.2d at 451.

C. Summary

The California rule is justified by the overwhelming need to supervise its more than 100,000 parolees, is consistent with the balance of interests struck by this Court in *Knights* and *Griffin*, and does not conflict with any decisions on which petitioner relies. There is no need for this Court to exercise its plenary authority in this case.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: July 7, 2005

Respectfully submitted,

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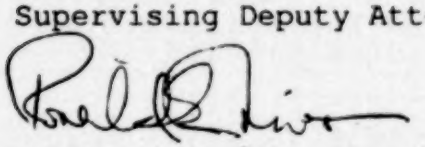

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No. 04-9728

IN THE

SUPREME COURT OF THE UNITED STATES

Donald Curtis Samson, *Petitioner*

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

CERTIFICATE OF SERVICE BY MAIL

I RONALD E. NIVER, a member of the Bar of this Court hereby certify that on July 7, 2005, three copies of the **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** in the above-entitled case were mailed, first class postage prepaid, to

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I further certify that all parties required to be served have been served.

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July 7, 2005

Honorable William K. Suter
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RE: *Samson v. The People of the State of California*
Case No. 04-9728

Dear Mr. Suter:

Enclosed find the document entitled:

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Please file the original plus 10 copies of the above document. Please stamp and return the file endorsed Attorney General copy to this office in the self-addressed envelope enclosed.

Sincerely,

Ronald Niver/dd
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For BILL LOCKYER
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No. 04-9728

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IN THE

SUPREME COURT OF THE UNITED STATES

DONALD CURTIS SAMSON -- PETITIONER

vs.

PEOPLE OF THE STATE OF CALIFORNIA -- RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In accordance with Supreme Court Rule 15.6, petitioner Donald Curtis Samson submits this reply brief to respond to new points raised in the brief in opposition filed by respondent People of the State of California.

ARGUMENT

Respondent asserts that the California rule allowing suspicionless searches of parolees -- as announced in *People v. Reyes*, 968 P.2d 445 (Cal. 1998), and followed by the Court of Appeal below -- does not conflict with the decisions of other states and of federal appellate courts. (Brief in Opp. 3.) The conflict could hardly be more stark.

The California Supreme Court held in *Reyes* that a warrantless search of the "*person or property*" of a parolee need not be justified by reasonable suspicion; rather, it "is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing." *Reyes*, 968 P.2d at 450 (emphasis added). The Louisiana rule is that a parole officer's "warrantless search of a *parolee and his home*" requires "a reasonable suspicion that criminal activity is occurring." *State v. Bonner*, 811 So. 2d 1151, 1153-54 (La. Ct. App. 2002) (emphasis added). As respondent notes (Brief in Opp. 5), *Bonner* involved the search of a dwelling. *Id.* at 1152. So did *Reyes*. *Reyes*, 968 P.2d

at 452-453 ("We therefore hold that evidence gleaned from *the search of this defendant's residence*, and from other searches conducted under the auspices of standard search conditions in paroles which predate today's decision, need not be excluded from evidence in subsequent criminal proceedings on grounds that the searches were undertaken without reasonable suspicion.") (emphasis added).[1]

It is true that the instant case involved the warrantless, suspicionless search of Mr. Samson's person, not of his residence. Mr. Samson's counsel is not aware of any authority, from any jurisdiction, suggesting that the level of suspicion required for the search of a parolee's person is different from that required for the search of a parolee's home. Indeed, respondent does not assert that there *should* be a difference or that any authority would support such a difference.[2] The Court of Appeal also saw no distinction between the search of a parolee's person and the search of his property; it quoted *Reyes* for the proposition that "'reasonable suspicion is no longer a prerequisite to conducting a

---

[1] *Commonwealth v. Hughes*, 836 A.2d 893 (Pa. 2003), and *United States v. Carnes*, 309 F.3d 950 (6th Cir. 2002), likewise involved searches of parolees' homes, as respondent notes (Brief in Opp. 5). *Hughes*, 836 A.2d at 896; *Carnes*, 309 F.3d at 953. As Mr. Samson explained in his certiorari petition, both the Supreme Court of Pennsylvania in *Hughes* and the United States Court of Appeals for the Sixth Circuit in *Carnes* set forth standards for parole searches that conflict with the standard promulgated by the California Supreme Court in *Reyes* and followed by the Court of Appeal below. (Pet. for Writ of Cert. 11-12.)

[2] Respondent argued to the Court of Appeal below that, because of *Reyes*, the court was "not free to accept appellant's position" that reasonable suspicion was required for the warrantless search of Mr. Samson's person. (Respondent's Br. 11.)

search of the subject's *person or property*,'" and it pronounced itself bound to follow *Reyes*. (Opn. 4), quoting *Reyes*, 968 P.2d at 450 (emphasis added).

Respondent also claims that the Ninth Circuit decision in *Moreno v. Baca*, 400 F.3d 1152 (9th Cir. 2003), does not conflict with *Reyes*. (Brief in Opp. 4.) According to respondent, the Ninth Circuit's statement that reasonable suspicion was necessary for a parole search was "dictum," whereas its *holding* was based on the officers' lack of knowledge of the suspect's parole status. (Brief in Opp. 4-5.)

With due respect, respondent is mistaken. After holding that the "reasonable suspicion" standard was applicable (400 F.3d at 1163) and that the police "lacked reasonable suspicion to detain and search" the parolee (*id.* at 1164), the court in *Moreno v. Baca* explicitly stated that it need not decide the constitutional significance of the officers' lack of knowledge of the parole status:

> We need not reach the separate question of whether the search was retroactively justified by the existence of a parole condition that rendered the suspicionless search reasonable, because we hold that the search would not have been reasonable even if the officers knew of Moreno's status as a parolee and the conditions of his parole at the time of the arrest and search.

Moreno v. Baca, 400 F.3d at 1164 n.9.

What respondent dismisses as "dictum," moreover, was expressly characterized by the Ninth Circuit panel majority as a holding:

> Taking into account the reduced privacy rights enjoyed by parolees and the State's interest in rehabilitating parolees and deterring crime, we *hold* that the Constitution requires that a law enforcement officer must, at minimum, have a reasonable suspicion that a parolee has engaged in criminal

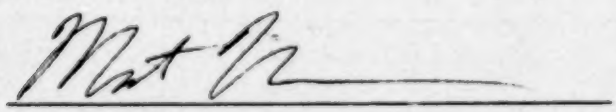
> wrongdoing or violated his parole prior to arresting him or conducting a search of his person.

Id. at 1163 (emphasis added).[3]

For the foregoing reasons, the California rule allowing suspicionless searches of parolees, announced in *People v. Reyes* and applied by the Court of Appeal below, conflicts with decisions of the courts of several other states and federal circuits, which hold that the Fourth Amendment requires at least a "reasonable suspicion" of criminal wrongdoing for the warrantless search of a parolee. The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARTIN KASSMAN
(Counsel of Record)



Attorney for Petitioner
DONALD CURTIS SAMSON

Date: July 20, 2005

---

[3] As Mr. Samson noted in his certiorari petition (Pet. for Writ of Cert. 13-14), a concurring judge attacked the majority's holding as legally incorrect and opined that it "should be treated as a bit of dictum." *Moreno v. Baca*, 400 F.3d at 1170-71, 1173 (Clifton, J., concurring in judgment).

MARTIN KASSMAN

ATTORNEY AT LAW

1032 IRVING ST., PMB 704

SAN FRANCISCO, CA 94122

July 20, 2005

Via UPS

Clerk
Supreme Court of the United States
1 First Street, N. E.
Washington, DC 20543

Re: *Samson v. California*, Case No. 04-9728

Dear Sir or Madam:

I represent petitioner Donald Curtis Samson. On his behalf, I have enclosed for filing the original and 10 copies of a Reply to Brief in Opposition to Petition for Writ of Certiorari, along with an original Proof of Service and an original Notice of Change of Address.

I also have enclosed an extra copy of the reply brief and an extra copy of the address change notice in a stamped, self-addressed envelope. Please endorse those extra copies as filed and return them to me.

Thank you for your attention.

Sincerely,

MARTIN KASSMAN

Enclosures

RECEIVED

JUL 25 2005

OFFICE OF THE CLERK
SUPREME COURT, U.S.

PHONE (415) 564-6732 • FAX (415) 946-3548

E-MAIL MARTY@KASSMAN.COM • WEB HTTP://WWW.KASSMAN.COM

IN THE

SUPREME COURT OF THE UNITED STATES

NOTICE OF CHANGE OF ADDRESS

PLEASE TAKE NOTICE that as of the date of this document, the attorney for petitioner Donald Curtis Samson has changed his address for service of notices and documents.

The new address of Martin Kassman is now:

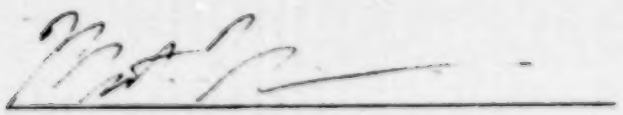
1032 Irving St., PMB 704
San Francisco, CA 94122

Any and all notices and documents regarding this action should now be sent to the above address.

All other contact information for Martin Kassman is unchanged.

Respectfully submitted,

MARTIN KASSMAN
(Counsel of Record)



Attorney for Petitioner
DONALD CURTIS SAMSON

Date: July 20, 2005

No. 04-9728

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD CURTIS SAMSON -- PETITIONER

vs.

PEOPLE OF THE STATE OF CALIFORNIA -- RESPONDENT

PROOF OF SERVICE

I, Martin Kassman, do swear or declare that on this date, July 20, 2005, as required by Supreme Court Rule 29, I have served the enclosed REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI and NOTICE OF CHANGE OF ADDRESS on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows: Ronald E. Niver, Esq., Office of the Attorney General, 455 Golden Gate Ave., Suite 11000, San Francisco, CA 94102-7004.

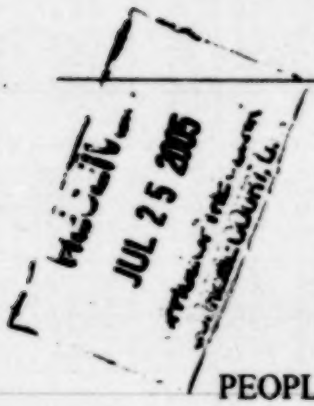
I declare under penalty of perjury that the foregoing is true and correct. Executed on July 20, 2005.

MARTIN KASSMAN

No. 04-9728

IN THE

SUPREME COURT OF THE UNITED STATES



DONALD CURTIS SAMSON -- PETITIONER

vs.

PEOPLE OF THE STATE OF CALIFORNIA -- RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE

NOTICE OF CHANGE OF ADDRESS

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Attorney for Petitioner
DONALD CURTIS SAMSON

FILED
NOV 28 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(14)

No. 04-9728

IN THE
Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

JOINT APPENDIX

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NOVEMBER 28, 2005

Petition For Writ Of Certiorari Filed April 12, 2005.
Certiorari Granted September 27, 2005.

TABLE OF CONTENTS

	Page
California Court of Appeal, First Appellate District Docket Entries	1
Superior Court Docket Entries	6
Opinion of the Court of Appeal	9
Order of Supreme Court of California	30
Proceedings on Motion to Suppress	31
Trial Testimony	64

California Court of Appeal, First Appellate District
Docket Entries

The People v. Samson
Division 1
Case Number A102394

Docket Entries (Register of Actions)

Date	Description	Notes
04/28/2003	Notice of appeal lodged/received (criminal).	
06/17/2003	Notice of record completion received.	
06/18/2003	Record on appeal filed.	c-1-r-5
06/18/2003	Probation report filed.	(1)
06/23/2003	Supplemental record/transcript filed.	r-1 (4-21-03)
07/02/2003	Counsel appointment order filed.	Atty Martin Kassman. (ind)
10/23/2003	Supplemental record/transcript filed.	r-1
10/23/2003	Certificate of county clerk filed.	the proceedings of the afternoon session of 3-20-03 were inadvertently included with the proceedings of 3-19-03 on page 56, line 12 to page 86, line 23/those proceedings are included in this

Date	Description	Notes
		transcript under the correct date of 3-20-03, starting on pg. 28, line 14.
02/17/2004	Appellant's opening brief.	Attorney: Kassman, Martin Party: Samson, Donald
03/22/2004	Respondent notified pursuant to rule 17(a)(2).	
03/23/2004	Respondent's brief.	Attorney: Office of Attorney General Party: The People
05/03/2004	Appellant's reply brief.	Attorney: Kassman, Martin Party: Samson, Donald
05/03/2004	Case fully briefed.	
05/11/2004	Record to court for review.	
05/13/2004	Case on conference list.	311
05/13/2004	Oral argument waiver notice sent.	
05/25/2004	Request for oral argument filed by:	Martin Kassman for appellant
06/16/2004	Calendar notice sent. Calendar date:	07/07/04 @ 9am.
07/07/2004	Cause argued - submission deferred.	appellant attorney filing motion this

Date	Description	Notes
	(See note field.)	week requesting additional briefing per new US Supreme Court decision
07/12/2004	Motion filed.	to file supplemental AOB.
07/12/2004	Order filed.	Aplnt's motion for leave to file supplemental opening brief is granted. Supp. AOB is due 21 days from date of this order. Supp. RB is due 21 days after the filing of supp AOB. Supp. ARB is due 14 days after filing of supp RB.
08/03/2004	Supplemental brief filed by:	aplnt.
08/20/2004	Supplemental brief filed by:	Attorney: Office of Attorney General (supp. ARB to 14 days) Party: The People
09/13/2004	Supplemental brief filed by:	(ARB)Attorney: Kassman, Martin Party: Samson, Donald

Date	Description	Notes
09/13/2004	Cause submitted.	
10/14/2004	Opinion filed.	Trial court is directed to correct the abstract of jdgmt to award dfdt 342 days of sentence credits rather than 339 days, and to forward corrected abstract of jdgmt to Dept. of Corrections. In all other respects, the jdgmt is affirmed.
11/29/2004	Petition for review in Supreme Court received.	appellant
01/12/2005	Petition for review denied in Supreme Court.	petition for review denied without prejudice to any relief sought to which defendant might be entitled after this court determines People v. Black and People v. Towne, the effect of Blakely v. Washington on California law
01/14/2005	Remittitur issued.	
01/14/2005	Case complete.	

Date	Description	Notes
04/26/2005	Filed letter from:	U.S. Supreme Court Washington D.C., dated 4/20/05: petition for certiorari was filed on 4/12/05 and placed on the docket 4/20/05 as No. 04-9728.
10/11/2005	Filed letter from:	US Supreme Court; dated 9/27; motion of petnr to proceed in forma pauperis and the petn for writ of certiorari are granted

Superior Court Docket Entries

SUPERIOR COURT - HALL OF JUSTICE & RECORDS
IN AND FOR THE COUNTY OF SAN MATEO

CASE NO. SC052426 A

PEOPLE VS. DONALD CURTIS SAMSON

JUDGE:	QUENTIN L. KOPP, JUDGE
CLERK:	LIZ LOPEZ
REPORTER:	LINDA SWANNER
2ND CLERK:	NONE
D.A.:	SARAI OBERMEYER
DEFENSE CO:	ERIC LIBERMAN
PROCEEDINGS:	PROBATION REPORT AND SENTENCING

CHARGES: 1. HS 11377(A) W/PC 1203(E)(4) W/PC 1170.12(C)(1) W/PC 667.5(B) W/PC 667.5(B)

DEFENDANT PRESENT IN CUSTODY.

ARGUMENT PRESENTED BY COUNSEL. MATTER SUBMITTED.

DEFENDANT'S MOTION FOR STRIKING A PRIOR DENIED.

DEFENDANT'S MOTION FOR PROBATION DENIED.

PROBATION IS DENIED.

DEFENDANT IS COMMITTED TO THE DEPARTMENT OF CORRECTIONS AS FOLLOWS:

AS TO COUNT 1. VS. HS 11377(A) IMPOSED THE UPPER TERM OF 3 YEAR(S) 0 MONTH(S).

BASE TERM IS DOUBLED PURSUANT TO PC 1170.12(C)(1).

PLUS ENHANCEMENT TO WIT PRIOR NO. 4 AS TO COUNT 1 PURSUANT TO PC 667.5(B) OF 1 YEAR(S) 0 MONTH(S).

DEFENDANT COMMITTED TO DEPARTMENT OF CORRECTIONS FOR THE TOTAL TERM OF 7 YEAR(S) 0 MONTH(S).

CREDIT FOR 227 ACTUAL DAYS SERVED, PLUS 112 DAYS GOOD TIME/WORK TIME PLUS 0 PROGRAM TIME FOR A TOTAL OF 339.

DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF TO BE DELIVERED TO CALIFORNIA STATE PRISON, SAN QUENTIN.

DEFENDANT SHALL PAY A $200.00 RESTITUTION FUND FINE AS MANDATED BY PENAL CODE SECTION 1202.4 PLUS 10% OR $0.00 COLLECTION FEE.

FINE(S) TO BE COLLECTED BY THE DEPARTMENT OF CORRECTIONS.

SENTENCE AS TO ALLEGATION NO. 5 AS TO COUNT 1 STAYED/STRICKEN. REASON: MOTION BY PEOPLE.

NARCOTICS REGISTERED AND PC 1202.45 FEE NOT ADDRESSED BY COUNSEL OR COURT.
ALL ORIGINAL SENTENCE ELEMENTS FOR THIS PROCEEDINGS ENTERED.

ENTERED ON CJIS BY LIZ LOPEZ DATE 4/21/2003.

NOTICE OF APPEAL AND REQUEST PRO APPOINTMENT OF COUNSEL FILED.

Opinion of the Court of Appeal

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

THE PEOPLE,
Plaintiff and Respondent,

v.

DONALD CURTIS SAMSON,
Defendant and Appellant.

October 14, 2004

Following denial of defendant's motion to suppress evidence (Pen. Code, § 1538.5) gathered pursuant to a parole search and a trial before a jury, he was found guilty of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The trial court found that defendant committed a charged prior conviction (Pen. Code, § 1170.12, subd. (c)(1)), and served prior prison terms (Pen. Code, § 667.5, subd. (b)).[1] On appeal, he again contests the validity of the parole search, and claims that the trial court erred in its calculation of sentence credits. In a supplemental brief he has complained of the violation of his Sixth Amendment right to a jury trial due to the trial court's imposition of an upper term of imprisonment. We find that the search was lawful pursuant to a condition of defendant's parole, and any violation of his jury trial right by imposition of an upper term was not prejudicial, but the calculation of sentence credits was in error. We therefore direct the trial

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[1] All further statutory references are to the Penal Code.

court to amend the judgment to add three days of sentence credits, but otherwise affirm the judgment.

STATEMENT OF FACTS[2]

On the afternoon of September 6, 2002, Officer Alex Rohleder of the San Bruno Police Department observed "two adults and a little baby walking down the street." One of the adults was defendant, whom Officer Rohleder recognized "from a prior contact." The officer was aware that defendant was on parole and heard from other officers that he "might have a parolee at large warrant." The officer therefore parked his patrol vehicle and "made contact" with defendant.

Officer Rohleder asked defendant if "he had a warrant at that time." Defendant replied, "no, he didn't. He had already taken care of it." Defendant added that he "was in good standing with his parole agent." Rohleder determined that defendant was not subject to a parole warrant, but nevertheless "conducted a parolee search" as he waited for a cover officer. He knew that during a previous contact with South San Francisco officers defendant warned that the police "weren't going to take him back to prison," but neither defendant's conduct nor officer safety caused him to undertake the search. The sole reason for the search, according to Officer Rohleder, was that defendant was "on parole." He explained: "Because it's a condition of his parole. I believe that being [a] parolee, that he needs to make sure he's still obeying the laws. It's a privilege for him to be out here."[3] n3

---

[2] Given that appellant has challenged only the propriety of the parole search and the sentence imposed, we will recite only the facts pertinent to the validity of the search, which were presented at the hearing on the motion to suppress.

[3] Appellant's condition of parole stated that he agreed to "search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or (...continued)

Officer Rohleder testified that he does not search all parolees "all the time," but does conduct parole searches "on a regular basis" unless he has "other work to do" or already "dealt with" the parolee. The officer intended to discharge defendant after the parole search "if he had nothing on him illegal."

Officer Rohleder found a cigarette box in defendant's left breast pocket. Inside the box was a plastic baggie that contained methamphetamine. Defendant was immediately placed under arrest.

Officer Rohleder testified that he then asked defendant's companion, Deborah Watson, for permission to search her, and she agreed. Nothing was found in her possession, and she was not detained.

Watson testified for the defense that as she and defendant were walking to a friend's house with her three-year-old son, Officer Rohleder approached and asked defendant "if he had a warrant for his arrest." Defendant did not say anything to the officer. Rohleder told appellant to "put his hands up on the car," and remove his jacket. He searched the jacket, then searched defendant "again a second time." According to Watson, the officer did not ask permission to search her, but rather told her to empty her pockets, and asked if she had any weapons or drugs. Officer Rohleder "went through" Watson's "belongings on the top of the hood of the car," then told her to "go home."

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without cause." "Such conditions are now automatic, and imposed on every parolee." (*People* v. *Lewis* (1999) 74 Cal.App.4th 662, 668.)

DISCUSSION

I. The Validity of the Parole Search.

Defendant argues that the officer did not conduct a valid parole search. He makes a two-pronged argument: First, that the search was not justified by a reasonable "individualized suspicion" of criminal activity; and second, that the search was "arbitrary, capricious and harassing."

Established law contravenes defendant's contention that a parole search must be based upon reasonable suspicion of criminal activity by the parolee. "In *People* v. *Reyes* (1998) 19 Cal.4th 743 [], the court overruled a previous decision, *People* v. *Burgener* (1986) 41 Cal.3d 505, 224 Cal. Rptr. 112 [], and held that an adult parolee subject to a search condition could be searched even if the searching officers did not have a reasonable suspicion that the parolee had violated or was planning to violate either the law or the conditions of parole. Subject to the same proviso from [*In re Tyrell J.* (1994) 8 Cal.4th 68] about arbitrary, capricious, or harassing searches, 'where the search is for a proper purpose, we hold that, even in the absence of particularized suspicion, a search conducted under the auspices of a properly imposed parole search condition does not intrude on any expectation of privacy "society is 'prepared to recognize as legitimate.' " [Citations.]' [Citation.]" (*People* v. *Lewis*, *supra*, 74 Cal.App.4th 662, 667-668; *see also People* v. *Cervantes* (2002) 103 Cal.App.4th 1404, 1407-1408.) Thus, "reasonable suspicion is no longer a prerequisite to conducting a search of the subject's person or property. Such a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing," and does not exceed the scope of the consent. (*People* v. *Reyes*, *supra*, at p. 752; *see also People* v. *Lewis*, *supra*, at pp. 667-668; *People* v. *Reed* (1994) 23 Cal.App.4th 135, 141; *People* v. *Velasquez* (1993) 21 Cal.App.4th 555, 558.)

Despite defendant's protest that the majority opinion in Reyes "is incorrect" and contrary to the position taken by other courts, "as an intermediate state appellate court, we, of course, are bound by decisions of the California Supreme Court. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal. 2d 450, 455 []; *People* v. *Superior Court* (*Persons*) (1976) 56 Cal. App. 3d 191, 194, 128 Cal. Rptr. 314 [].)" (*People* v. *Zichwic* (2001) 94 Cal.App.4th 944, 952-953; *see also People* v. *Superior Court* (*Moore*) (1996) 50 Cal.App.4th 1202, 1211; *People* v. *Brackett* (1994) 25 Cal.App.4th 488, 501.) We therefore conclude that the parole search of defendant did not require a particularized suspicion of criminal activity. (*People* v. *Zichwic, supra,* at pp. 952-953.)

We turn to defendant's argument that the parole search was "arbitrary, capricious and harassing" under the standard articulated in Reyes. "A search is arbitrary 'when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee.' (*People* v. *Reyes, supra,* 19 Cal.4th at p. 754.) A search is a form of harassment when its motivation is a mere whim or caprice." (*People* v. *Cervantes, supra,* 103 Cal.App.4th 1404, 1408.) "It may be unreasonable ' "if made too often, or at an unreasonable hour, or if unreasonably prolonged." ' [Citation.]" (*People* v. *Zichwic, supra,* 94 Cal.App.4th 944, 951, quoting from *People* v. *Reyes, supra,* at pp. 753-754; *see also People* v. *Bremmer* (1973) 30 Cal. App. 3d 1058, 1062, 106 Cal. Rptr. 797.)

We find nothing arbitrary or capricious in the search. "It is only when the motivation for the search is wholly arbitrary, when it is based merely on a whim or caprice or when there is no reasonable claim of a legitimate law enforcement purpose, e.g., an officer decides on a whim to stop the next red car he or she sees, that a search based on a [parole] search condition is unlawful." (*People* v.

Cervantes, supra, 103 Cal.App.4th 1404, 1408.) Officer Rohleder did not detain defendant indiscriminately or at his whim, but rather recognized him as a parolee, and thought he may be subject to an outstanding "parolee at large warrant." The lawful basis for the search did not dissipate when the officer learned the warrant was not active. Nor was the officer compelled to rely upon "officer safety" to undertake the search.[4] The warrantless search was predicated entirely upon defendant's parole status, not the warrant or the need for officer safety. And a legitimate law enforcement purpose for a parole search was expressed by Officer Rohleder: to determine whether defendant, as a parolee, was "still obeying the laws." If defendant "had nothing on him illegal," the officer intended to release him. The testimony by Officer Rohleder that he customarily searches identified parolees does not demonstrate arbitrariness, and indicates that the search was not conducted by the officer for the purpose of harassment or due to any personal animosity toward defendant. (*People* v. *Reed, supra*, 23 Cal.App.4th 135, 143.) Finally, the record shows that the search was not unreasonable in duration or the circumstances of its execution. We therefore conclude that the search of defendant was lawful.

II. The Calculation of Sentence Credits.

Defendant also argues that he is entitled to "an additional 3 days" of sentence credits, for a total of 342 days. The Attorney General concedes that an error in the calculation of sentence credits was committed, and upon review of the record we agree.

III. The Imposition of an Upper Term.

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[4] In fact, Rohleder discounted officer safety as a reason for the search.

We have granted defendant the opportunity to submit a supplemental brief to present the argument that under the recent United States Supreme Court decision in *Blakely* v. *Washington* (2004) 542 U.S. ___ [159 L. Ed. 2d 403, 124 S. Ct. 2531], (*Blakely*), the trial court erred by imposing an upper term for his possession of methamphetamine conviction without an admission or supporting finding made by the jury beyond a reasonable doubt. He maintains that under the *Blakely* opinion the jury verdict, "standing alone," did not authorize the upper term selected as a sentence choice by the trial court. He adds that, "California's sentencing scheme required the trial court to impose the middle term, unless it justified a departure by reference to factors other than those necessarily found by the jury - just as the Washington statutory scheme involved in *Blakely* required an 'exceptional' sentence to be justified by reference to factors other than those used in computing the standard range sentence." Therefore, he complains that imposition of upper term upon him violated his constitutional rights as defined in *Blakely*.[5]

We first dispose of respondent's contention that defendant "forfeited" any claim of *Blakely* error by failing to "request a jury trial" to determine the existence of a fact that may increase his sentence. "Claims of error relating to sentences 'which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner' are waived on appeal if not first raised in the trial court." (*People* v. *Brach* (2002) 95 Cal.App.4th 571, 577; see also *People* v. *Breazell* (2002) 104 Cal.App.4th

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[5] We are of course aware that the effect of *Blakely*, *supra*, 542 U.S. __ [124 S. Ct. 2531], on California sentencing law is already before the California Supreme Court in *People* v. *Black*, review granted July 8, 2004, S126182, and *People* v. *Towne*, review granted June 18, 2004, S125677.

298, 304-305.) According to a fundamental principle of appellate procedure, "with certain exceptions, an appellate court will not consider claims of error that could have been-but were not-raised in the trial court." (*People* v. *Vera* (1997) 15 Cal.4th 269, 275.) " 'An appellate court should not take notice of matters not first presented to and considered by the trial court, where to do so would unfairly permit "one side to press an issue or theory on appeal that was not raised below." [Citation.]' [Citation.]" (*People* v. *Catlin* (2001) 26 Cal.4th 81, 171.) " 'Generally speaking, the rationale underlying the rule requiring objection below as a prerequisite to complaint on appeal regarding some error by the trial court is predicated on the premise that, in its absence, the People would be deprived of the opportunity to cure the defect in the trial court and the defendant would be allowed to gamble on a favorable result-secure in the knowledge that if he did not prevail there, he would be able to prevail on appeal. . . .' [Citation.]" (*People* v. *Zamarron* (1994) 30 Cal.App.4th 865, 870; *see also People* v. *McClellan* (1993) 6 Cal.4th 367, 377.) The waiver doctrine also seeks to "'"encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided . . . ."' [Citation.]" (*People* v. *Peel* (1993) 17 Cal.App.4th 594, 600.)

"The California Supreme Court has repeatedly held" that even "constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal." (*People* v. *Rudd* (1998) 63 Cal.App.4th 620, 628, citing *People* v. *Williams* (1997) 16 Cal.4th 153, 250; *People* v. *Padilla* (1995) 11 Cal.4th 891, 971; *People* v. *Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People* v. *Garceau* (1993) 6 Cal.4th 140, 173-174; *People* v. *McPeters* (1992) 2 Cal.4th 1148, 1174; *People* v. *Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10.) '"'No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the

failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' [Citation.]" (*People* v. *Saunders* (1993) 5 Cal.4th 580, 590, fn. omitted; *see also People* v. *Rudd, supra*, at p. 629.)

However, "Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People* v. *Vera, supra*, 15 Cal.4th 269, 276.) Further, failure to object does not prevent correction or vacation of an "unauthorized sentence" on appeal. (In re Birdwell (1996) 50 Cal.App.4th 926, 931.) "An unauthorized sentence is a narrow exception to the requirement that the parties raise their claims in the trial court to preserve the issue for appeal." (*People* v. *Breazell, supra*, 104 Cal.App.4th 298, 304.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*People* v. *Scott* (1994) 9 Cal.4th 331, 354; *see also People* v. *Breazell, supra*, at p. 304; *People* v. *McGee* (1993) 15 Cal.App.4th 107, 117.) "Claims involving unauthorized sentences or sentences entered in excess of jurisdiction can be raised at any time." (*People* v. *Andrade* (2002) 100 Cal.App.4th 351, 354; *see also People* v. *Turner* (2002) 96 Cal.App.4th 1409, 1415.) A related exception to the waiver rule is that it "is generally not applied when the alleged error involves a pure question of law, which can be resolved on appeal without reference to a record developed below." (*People* v. *Williams* (1999) 77 Cal.App.4th 436, 460.)

In the present case defendant has presented a claim of deprivation of the fundamental constitutional rights to jury trial and proof beyond a reasonable doubt. (*People* v. *Holmes* (1960) 54 Cal.2d 442, 443-444, 5 Cal. Rptr. 871.)

The constitutional challenge raised by defendant is an issue of law that we may decide without reference to the particular sentencing record developed in the trial court. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 815.) And if his position is found to have merit, the sentence may not lawfully be imposed under any circumstances without a jury trial, and as an unauthorized component of his disposition may be corrected on appeal despite the lack of an objection in the trial court. (*Ibid.*; *People* v. *Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2; *People* v. *Blackburn* (1999) 72 Cal.App.4th 1520, 1534; *People* v. *Chambers* (1998) 65 Cal.App.4th 819, 823; *In re Paul R.* (1996) 42 Cal.App.4th 1582, 1590; *People* v. *Sexton* (1995) 33 Cal.App.4th 64, 69.) Finally, *Blakely* was decided after defendant was sentenced, and therefore he had no reason to object in the face of previously established law that unfailingly declared a defendant has no constitutional right to a jury trial in connection with the imposition of an upper term of imprisonment. (*See People* v. *Ochoa* (2004) 121 Cal.App.4th 1551, 1565; *People* v. *Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *People* v. *Ramos* (1980) 106 Cal. App. 3d 591, 605-606, 165 Cal. Rptr. 179; *People* v. *Williams* (1980) 103 Cal. App. 3d 507, 510, 163 Cal. Rptr. 169; *People* v. *Betterton* (1979) 93 Cal. App. 3d 406, 410-411, 155 Cal. Rptr. 537; *People* v. *Nelson* (1978) 85 Cal. App. 3d 99, 102-103, 149 Cal. Rptr. 177; *U.S.* v. *Harrison* (8th Cir. 2003) 340 F.3d 497, 500.) We cannot find that he voluntarily and intelligently relinquished a known right, or forfeited his right to object on appeal by failing specifically to raise an objection in a timely fashion. We therefore conclude that defendant has not waived his right to complain of denial of the right to a jury trial under *Blakely*, and despite the lack of an objection below elect to address his constitutional claims on their merits. (*People* v. *Ochoa*, *supra*, at p. 1565; *People* v. *Peck* (1996) 52 Cal.App.4th 351, 362, fn. 5; *see also People* v. *Marshall* (1996) 13 Cal.4th 799, 831-832; *People* v. *Ashmus*, *supra*, 54 Cal.3d 932, 976; *In re Khonsavanh*

S. (1998) 67 Cal.App.4th 532, 537; *People* v. *Williams* (1998) 61 Cal.App.4th 649, 657.)

In *Blakely*, the United States Supreme Court revisited the rule articulated in *Apprendi* v. *New Jersey* (2000) 530 U.S. 466, 490, 147 L. Ed. 2d 435 (*Apprendi*), that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." (*Blakely*, *supra*, 124 S. Ct. 2531, 2536, italics added.) At issue in *Blakely* was whether the determinate sentencing procedure in the State of Washington deprived the defendant of his "federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." (*Id.* at p. 2536.) The petitioner entered a guilty plea to second-degree kidnapping of his estranged wife in which he admitted domestic violence and use of a firearm, but "no other relevant facts." (*Id.* at pp. 2534-2535.) Under the Washington Criminal Code (§§ 9A.40.030(3); 9A.20.021(1)(b)), second-degree kidnapping was designated a class B felony that carried a maximum statutory sentence of 10 years. (*Blakely*, *supra*, at p. 2535.) The governing Washington sentencing guidelines further limited the presumptive "standard range" to 49-53 months, but authorized the judge to impose a sentence above the specified range, although below the 10-year maximum, upon a finding by a preponderance of the evidence of "substantial and compelling reasons justifying an exceptional sentence." (*Ibid.*, citing Wash. Rev. Code § 9.94A.120(2)). At the sentencing proceeding, an "exceptional sentence" of 90 months was imposed, based upon the trial judge's finding that the petitioner used "deliberate cruelty" in the commission of the offense, which was one of the

statutorily enumerated grounds for departure from the standard sentencing range. (*Blakely*, *supra*, at p. 2535.)[6]

The court in *Blakely* reaffirmed the commitment articulated in its prior decisions in *Apprendi*, *supra*, 530 U.S. 466, and *Ring* v. *Arizona* (2002) 536 U.S. 584, 153 L. Ed. 2d 556, "to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." (*Blakely*, *supra*, 124 S. Ct. 2531, 2538-2539.) The Sixth Amendment, declared the court, "is not a limitation on judicial power, but a reservation of jury power." (Id., at p. 2540.) The court further observed that "*Apprendi* carries out this design by ensuring that the judges' authority to sentence derives wholly from the jury's verdict." (*Id.*, at p. 2539.)

The court in *Blakely* operated from the essential conclusion reached in both its *Apprendi* and *Ring* decisions that a defendant's constitutional rights have been violated when a judge "imposes a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi*, *supra*, at 491-497, 120 S. Ct. 2348; *Ring*, *supra*, at 603-609, 122 S. Ct. 2428." (*Blakely*, *supra*, 124 S. Ct. 2531, 2537.) The notion advocated by the State in *Blakely* "that there was no *Apprendi* violation because the relevant 'statutory maximum' is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b)," and "no exceptional sentence may exceed that limit," was

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[6] Under the Washington Sentencing Reform Act, the factors that may be relied upon to justify a finding of an exceptional sentence are listed, but the list is illustrative not exhaustive. A factor may be taken into consideration to impose an exceptional sentence only if it is not already taken into account in the calculation of the standard range sentence for the offense. (*Blakely*, *supra*, 124 S. Ct. 2531, 2535.)

rejected as contrary to those "clear" precedents. (*Blakely, supra*, 124 S. Ct. 2531, 2537.) Instead, the court defined "the 'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid*; *see also United State*[illegible] v. *Ameline* (9th Cir. 2004) 376 F.3d 967, 975.)

The court then concluded: "The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, '[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense,' [citation], which in this case included the elements of second-degree kidnapping and the use of a firearm, *see* §§ 9.94A. 320, 9.94A.310(3)(b). Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. *See* § 9.94A.210(4). The 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)." (*Blakely, supra*, 124 S. Ct. 2531, 2537-2538, fn. omitted.) "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as here), it remains the case that

the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Blakely*, *supra*, at p. 2538.) "Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence." (*Blakely*, *supra*, at p. 2538, fn. 8.)

Without deciding that defendant's constitutional rights pursuant to the *Blakely* opinion were violated, we find that he did not suffer prejudice from the imposition of the upper term upon him without a separate finding by the jury of aggravating circumstances beyond a reasonable doubt. We do not, as defendant urges, consider the denial of *Blakely* jury trial rights during sentencing proceedings to be of such fundamental, structural magnitude to require reversal "without regard to prejudice." And we conclude under a harmless error analysis that defendant would have been sentenced to an upper term even without the trial court's finding of any aggravating factors in violation of *Blakely*.

In *Arizona* v. *Fulminante* (1991) 499 U.S. 279, 113 L. Ed. 2d 302, "a majority of the high court, in discussing the applicable harmless error standard for constitutional errors, distinguished 'trial error,' that is, an error which 'occurs during the presentation of the case to the jury,' from 'structural defects,' such as denial of a public trial, which 'affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself.' The former errors are subject to *Chapman* analysis (*see Chapman* v. *California* (1967) 386 U.S. 18, 24 [17 L. Ed. 2d 705, 710-711, 87 S. Ct. 824, 24 A.L.R.3d 1065] [error or deprivation must be shown harmless beyond reasonable doubt]), whereas the latter errors are deemed

reversible per se." (*People* v. *Woodward* (1992) 4 Cal.4th 376, 387.) "There is ~~a strong~~ presumption any error falls within the [former] category, and it is the rare case in which a constitutional violation will not be subject to harmless error analysis." (*People* v. *Marshall*, *supra*, 13 Cal.4th 799, 851.) "In only a few cases has the Supreme Court found a constitutional violation which is not subject to harmless error analysis." (*People* v. *Evans* (1998) 62 Cal.App.4th 186, 194.)

The United States Supreme Court has " 'recognized that "most constitutional errors can be harmless." [Citation.] "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." [Citation.] Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." ' " (*People* v. *Scott* (2001) 91 Cal.App.4th 1197, 1210, citing *Johnson* v. *United States* (1997) 520 U.S. 461, 468, 137 L. Ed. 2d 718 [].) " 'The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.' " (*People* v. *Flood* (1998) 18 Cal.4th 470, 492, citing *Rose* v. *Clark* (1986) 478 U.S. 570, 579, 92 L. Ed. 2d 460.)

We recognize that where ~~the right~~ to a jury trial is " 'altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.' [Citation.]" (*People* v. *Avila* (1995) 35 Cal.App.4th 642, 656, fn. omitted; see also *People* v. *Collins* (2001) 26 Cal.4th 297, 312-313.) "Where demonstration of prejudice

is ' "a practical impossibility, prejudice must necessarily be implied." ' [Citation.]" (*People* v. *Molina* (2000) 82 Cal.App.4th 1329, 1333.)

But here, the denial of the rights to a jury trial to proof beyond a reasonable doubt are only associated with the finding of one or perhaps two among many aggravating circumstances that contributed to the selection of the upper term, not the structure of the trial itself that resulted in the guilty verdict and imposition of sentence. Defendant was tried and found guilty by a fairly selected, impartial jury. He was represented by counsel and received a full opportunity to elicit evidence and offer argument to an impartial judge to support imposition of a middle or lower term. Placed in context, the lack of a jury finding of an aggravating circumstance does not rise to the level of an error that automatically requires reversal of an otherwise valid sentence. (*See Rose* v. *Clark*, *supra*, 478 U.S. 570, 579; *People* v. *Evans*, *supra*, 62 Cal.App.4th 186, 197.) The nature of the error also permits a quantitative assessment of prejudice in the context of the evidence presented in order to determine whether the error was harmless. (*Arizona* v. *Fulminante*, *supra*, 499 U.S. 279, 307-308; *People* v. *Marshall*, *supra*, 13 Cal.4th 799, 851.) We find that any sentencing error under *Blakely* is not a structural defect that demands automatic reversal. (*See People* v. *Epps* (2001) 25 Cal.4th 19, 29; *People* v. *Vera*, *supra*, 15 Cal.4th 269, 278; *People* v. *Marshall*, *supra*, at pp. 851-852.) Rather, we follow the standard of review for federal constitutional errors (*Chapman* v. *California*, *supra*, 386 U.S. 18, 24), and must reverse the sentence unless it appears beyond a reasonable doubt that the assumed error did not contribute to the verdict. (*People* v. *Neal* (2003) 31 Cal.4th 63, 86; *People* v. *Carter* (2003) 30 Cal.4th 1166, 1221-1222; *People* v. *Sengpadychith* (2001) 26 Cal.4th 316, 326.)

Our review of the record discloses that to impose the upper term upon defendant the trial court properly relied upon numerous aggravating factors that do not fall within the reach of the right to a jury trial articulated in *Blakely*. Defendant's record of prior offenses, including multiple crimes of violence, is lengthy and unrelenting. As aggravating factors to support the sentence choice, the court cited - in addition to lack of remorse and failure to take advantage of treatment programs - defendant's "record of prior convictions, some of which involve violent conduct; his prior service of prison terms; his lack of satisfactory performance while on parole;" and his "prior conduct while on parole, including five parole violations." No mitigating factors were cited by the court or mentioned in the probation report.

The aggravating factors that relate to defendant's prior convictions and other recidivist conduct did not implicate his right to a jury trial under the current state of the law. In *Apprendi* the court specifically declared that based on its prior decision in *Almendarez-Torres* v. *United States* (1998) 523 U.S. 224, 140 L. Ed. 2d 350, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. 466, 490, italics added; *see also People* v. *Taylor* (2004) 118 Cal.App.4th 11, 28; *People* v. *Superior Court* (*Andrades*) (2003) 113 Cal.App.4th 817, 831; *People* v. *Lee* (2003) 111 Cal.App.4th 1310, 1314.) Thus, "by its terms, the holding of *Apprendi* does not apply to 'the fact of a prior conviction . . . .' [Citation.]" (*People* v. *Taylor*, *supra*, at p. 28.) "*Apprendi* was absolutely clear in excepting the fact of prior convictions from its new rule." (*Thompson* v. *Superior Court* (2001) 91 Cal.App.4th 144, 154.)

Nothing articulated in the *Blakely* opinion casts doubt upon the exclusion in *Apprendi* of prior conviction allegations from the constitutional right to jury trial, and

the California Supreme Court has steadfastly declared that neither the federal nor state constitutions confer the right to have a jury determine any factual issues relating to prior convictions alleged for purposes of sentencing enhancement. (*People* v. *Epps*, *supra*, 25 Cal.4th 19, 23; *People* v. *Kelii* (1999) 21 Cal.4th 452, 455; *People* v. *Vera*, *supra*, 15 Cal.4th 269, 277; *People* v. *Wiley* (1995) 9 Cal.4th 580, 585; *People* v. *McGee* (2004) 115 Cal.App.4th 819, 828.) Even in the aftermath of *Apprendi* our high court held: "The right, if any, to a jury trial of prior conviction allegations derives from sections 1025 and 1158, not from the state or federal Constitution." (*People* v. *Epps*, *supra*, at p. 23; *see also People* v. *Belmares* (2003) 106 Cal.App.4th 19, 27.)

The exception has also been found to apply not only to the fact of a prior conviction, but to "an issue of recidivism which enhances a sentence and is unrelated to an element of a crime." (*People* v. *Thomas* (2001) 91 Cal.App.4th 212, 223; *see also People* v. *Taylor*, *supra*, 118 Cal.App.4th 11, 28-29.) A narrow reading of the *Apprendi* language to apply to nothing more than the "fact of a prior conviction" fails to consider the bases for the exception, and "takes that language out of its context." (*People* v. *Thomas*, *supra*, at p. 216.) A reason for the exemption of prior convictions from the scope of the jury trial requirement for increased sentences, explained the court, is that "procedural safeguards attached to any 'fact' of prior conviction." (*Apprendi*, *supra*, 530 U.S. 466, 488; *see also People* v. *Lee*, *supra*, 111 Cal.App.4th 1310, 1314.) The court further emphasized that the fact of a prior conviction " 'does not relate to the commission of the offense.' " (*Apprendi*, *supra*, at pp. 488, 496, quoting *Almendarez-Torres* v. *United States*, *supra*, 523 U.S. 224, 230, 244; *see also People* v. *Taylor*, *supra*, at p. 29.) And finally, the court "excepted the fact of a prior conviction from this holding, because of the long tradition allowing sentencing judges to consider the defendant's recidivism." (*People* v. *Bowden* (2002) 102 Cal.App.4th 387, 392, italics

omitted; *see also Jones* v. *United States* (1999) 526 U.S. 227, 249, 143 L. Ed. 2d 311.) "Recidivism 'is as typical a sentencing factor as one might imagine.' " (*Castillo* v. *United States* (2000) 530 U.S. 120, 126, 147 L. Ed. 2d 94.)

"Courts have construed Apprendi as requiring a jury trial except as to matters relating to 'recidivism. ' Courts have not described *Apprendi* as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism.' [Citations.] Appellate courts have held that *Apprendi* does not require full due process treatment to recidivism allegations which involved elements merely beyond the fact of conviction itself." (*People* v. *Thomas*, *supra*, 91 Cal.App.4th 212, 221-222; *see also People* v. *Belmares*, *supra*, 106 Cal.App.4th 19, 27-28.)

Thus, in *People* v. *Thomas*, *supra*, 91 Cal.App.4th 212, the court concluded that under *Apprendi* the defendant was not entitled to a jury trial on two prior prison term allegations. Following an analysis of *Apprendi* and its predecessor *Almendarez-Torres* v. *United States*, *supra*, 523 U.S. 224, 226, the court declared: "With the foregoing legal analysis in mind, we reach the following conclusions. In terms of recidivism findings that enhance a sentence and are unrelated to the elements of a crime, *Almendarez-Torres* is the controlling due process authority. *Almendarez-Torres* does not require full due process treatment of an issue of recidivism which enhances a sentence and is unrelated to an element of a crime. *Apprendi* did not overrule *Almendarez-Torres*. The language relied upon by defendant in *Apprendi*, 'other than the fact of a prior conviction,' refers broadly to recidivism enhancements which include section 667.5 prior prison term allegations." (Id., at pp. 222-223; *see also People* v. *Taylor*, *supra*, 118 Cal.App.4th 11, 28-29.)

We similarly conclude that the trial court in the case before us did not violate defendant's jury trial rights by finding aggravating circumstances based upon his recidivism. Defendant's prior prison terms and performance on parole arose out of his prior convictions previously found by the trier of fact or admitted by him, may be established by review of court records, and did not relate to commission of the current offense. Therefore, the aggravating circumstances relating to defendant's recidivism were properly relied upon by the court to impose an upper term without affording defendant the right to a jury trial. (*People* v. *George* (2004) 122 Cal.App.4th 419 [Sept. 15, 2004, D.A.R. 11568, 11573.) We further conclude that defendant's prior convictions, prison terms, and poor performance on parole justified the selection of an upper term, which we are convinced the trial court certainly would have imposed even without finding any facts that require a jury trial under *Blakely*. "California courts have long held that a single factor in aggravation is sufficient to justify a sentencing choice, including the selection of an upper term . . . ." (*People* v. *Brown* (2000) 83 Cal.App.4th 1037, 1043.) Here, a multitude of aggravating circumstances established by persuasive evidence were not offset by any mitigating circumstances. Thus, even if the trial court erred in finding aggravating factors, the decision to impose the upper term was constitutionally valid and not prejudicial to defendant. (*See People* v. *Burbine* (2003) 106 Cal.App.4th 1250, 1263-1264; *People* v. *Williams* (1996) 46 Cal.App.4th 1767, 1782-1783.)

DISPOSITION

Accordingly, the trial court is directed to correct the abstract of judgment to award defendant 342 days of sentence credits rather than 339 days, and to forward the corrected abstract of judgment to the Department of Corrections. In all other respects the judgment is affirmed.

Swager, J.

We concur:

Marchiano, P. J.
Margulies, J.

Order of Supreme Court of California

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DONALD CURTIS SAMSON, Defendant and Appellant

Petition for review denied without prejudice to any relief to which defendant might be entitled after this court determines in *People* v. *Black*, S126182, and *People* v. *Towne*, S125677, the effect of *Blakely* v. *Washington* (2004) __ U.S. __ 124 S.Ct. 2531, on California law.

GEORGE

Chief Justice

FILED

JAN 12 2005

Frederick K. Ohlrich Clerk

Proceedings on Motion to Suppress

TESTIMONY OF ALEX ROHLEDER
[Page 20]

DIRECT EXAMINATION

BY MS. OBERMEYER: Thank you.

Q Officer Rohleder, am I pronouncing your name, correctly?

A Yes ma'am.

Q How are you employed?

A I'm a police officer with the City of San Bruno.

Q How long have you been so employed?

A Approximately four years.

Q Were you on duty on September 6th, 2002, at approximately 5:34 pm, in the area of Angus and Mastick in San Bruno, here in County of San Mateo?

A Yes I was.

Q What happened at that date and time?

A I made contact with actually two adults and a little baby walking down the street.

Q Do you see one of those adults in Court here today?

[Page 21]

A Yes I do.

Q Could you identify that person for the record by where that person is seated, what he's wearing?

A He's seated second to left. He's wearing the orange jump suit and short hair.

THE COURT: The record will reflect the identification of the defendant.

MS. OBERMEYER: Thank you.

Q What brought your attention to the defendant on that date and time?

A The defendant himself?

Q What about the defendant got your attention?

A I recognized him from a prior contact. And I was under the impression that he might have a parolee at large warrant.

Q Okay. Were you aware that he was on parole?

A Yes.

Q What did you do?

A I made contact with him.

Q And how did you do that?

A I parked my patrol vehicle across the street and I asked if I could speak with him.

Q And what happened?

A They stopped. And I asked him, if he had a warrant at that time. He told me, no, he didn't. He had already taken care of it. And he was released from

[Page 22]

custody.

Q All right. And did you discuss his status of whether or not he was on parole?

A Yes I did.

Q What did he say?

A He said, he was. And he was in good standing with his parole agent.

Q All right. He stated, he was a parolee?

A Yes.

Q What did you do?

A Identified who I was with the lady and him. Called it in, his name and date of birth. I waited for a cover officer. And at that time I conducted a parolee search.

Q And when you called it in, did you receive any information?

A Yes. They told me he was currently on parole.

Q And then, that lead to you conducting the parole search?

A Yes.

Q And what, if anything, did you find in searching the defendant?

A A cigarette box in his left breast pocket.

Q And what, if anything, was in the cigarette box?

A Inside the box was a plastic baggy containing

[Page 23]

Methampnetamine.

Q All right. Now did you bring to Court today the suspected narcotics?

A Yes I did.

THE COURT: We're not here for decisions on whether or not to hold him to answer, are we?

MS. OBERMEYER: No we're not, Your Honor.

THE COURT: And Mr. Lieberman, I take it, you're willing, for purposes of this motion, to stipulate that the item referred to by the Officer being Methamphetamine, was, in fact, Methamphetamine?

MR. LIEBERMAN: For purposes of this hearing only.

MS. OBERMEYER: I do Your Honor.

THE COURT: Okay.

Anything else on that issue?

I don't want to restrict your evidentiary usage of it, if it has some relevant on some other issue. But on whether or not there was controlled substance, it sounds like, that that's not really an issue here at this point?

MS. OBERMEYER: No. I understand what the Court is stating as to the substance was, in fact, Methamphetamine. However, we do have the substance

[Page 24]

here in the Court today to introduce it, if the Court feels it's necessary for hearing.

THE COURT: I've seen enough Methamphetamine, I don't need to see another sample of it.

MS. OBERMEYER: Then people have no further questions of this witness at this—

THE COURT: Cross-examine, Counsel?

CROSS-EXAMINATION

BY MR. LIEBERMAN:

Q Good morning.

A Good morning.

Q Were you out actively looking for Mr. Samson on the day of this contact?

A No I was not.

Q Okay. You just happened to run across him and recognize him?

A Yes I did.

Q What was the nature of the prior contact that gave rise to your recognition?

A I don't understand the question.

Q You say, you recognized him from a prior contact?

A Yes.

THE COURT: What was the prior contact?

(Talking over one another).

THE WITNESS: South San Francisco Police

[Page 25]

Department had arrested him. I believe it was an incident on his girlfriend. I don't want to say, stalking, but I believe it was an incident with his girlfriend.

MR. LIEBERMAN: Okay.

Q And did you make any attempts to check his status, warrants, or otherwise in your police car before making contact with Mr. Samson?

A I do not believe so. I do not believe so.

Q Do you have the ability to do so?

A In my car?

Q Yes.

A Yes I do.

Q Okay. So why wouldn't you do that, seeing somebody you recognize to be in your mind a parolee at large?

A What wouldn't I check? Because exactly that, he's a parolee at large.

Q You did call for back up before contacting Mr. Samson?

A I told him, I was out with two subjects and they automatically send me cover.

Q Okay. And why were you under the impression that there was parolee at large warrant for Mr. Samson?

A There was some officers that were talking about it. I believe they were attempting to search the

[Page 26]

warrant on Montgomery, his old residence Montgomery.

Q When did that conversation tell you?

A I couldn't tell you. It's just police, police talk.

Q But, but you realize now, of course, that simply was incorrect and there wasn't the parolee at large?

A That is correct.

THE COURT: Excuse me. It's not clear to me. You told us earlier, that the defendant was asked by, something to the effect, if he had a warrant. And he said to you, he took care of it. And then he was released from custody.

THE WITNESS: Yes.

THE COURT: Which implies, suggests to me, I was inferring from that, that in fact, there was a warrant for his arrest, parole warrant, but it had been resolved by him somehow earlier.

Is that your understanding what he was telling you?

THE WITNESS: Yes Your Honor.

THE COURT: In fact, there was an arrest parole warrant, you, that had been taken care?

THE WITNESS: That's what happened.

THE COURT: You ultimately learned that from the defendant?

[Page 27]

THE WITNESS: Yes.

THE COURT: Just to make sure I understood that.

MR. LIEBERMAN:

Q Looking into this matter of the warrant, but you determined there wasn't a warrant, isn't it true, you found out he just finished serving 10 months term for CDC?

A I cannot recall how long he said he served.

Q Just been released from serving the sentence?

A Yes.

Q Is it possible the information you had about a warrant was as much as up to a year old?

A No idea.

Q Okay. It wasn't any fresh information, was it?

A Just when I work, police work, there's several different things to look for. And when I see in my community, when I saw him, I recognized him as a parolee. I recognized in my head, he possibly had a warrant. That's why I got out of my car to see if he did or did not.

I went to investigate if he had one. I did not arrest him on that warrant.

Q You don't necessarily presume all parolees that you know, have warrants, though, do you?

A No I didn't, don't.

[Page 28]

Q The first thing you asked him about was the warrant, correct?

A Yes.

Q And you told him it clear, correct?

A Yes.

Q And you checked that out yourself, correct?

A Yes.

Q And you nonetheless decided to search him, is that correct?

A That is correct.

Q Okay. How come?

A Okay. Because he's on parole.

Q Okay. Search him merely because you could, in other words?

A Because it's a condition of his parole. I believe that being parolee, that he needs to make sure he's still obeying the laws. It's a privilege for him to be out here.

Q Okay. So your training or personal opinion—

(Talking over one another).

MS. OBERMEYER: Objection. Argumentative.

THE COURT: It's irrelevant. Sustained.

MR. LIEBERMAN: Okay.

Q Do you search all parolees on sight, when you see them?

MS. OBERMEYER: Objection. Irrelevant.

[Page 29]

MR. LIEBERMAN: That is relevant.

THE COURT: Say what? Mr. Lieberman, I don't remember asking him what your response was.

MR. LIEBERMAN: That's why I stopped talking.

THE COURT: That a boy.

No. I could see some possible potential relevance. Overruled.

Your question, again?

MR. LIEBERMAN:

Q Do you search all parolees on sight, when you make contact with them?

A It depends.

Q On what?

A If I contact a parolee or if I just drive by one.

Q Well, if you just drive by one?

A If I drive by one and I already dealt with him earlier in the day or have dealt with him, I just drive by. I have other work to do. I don't go after everybody all the time.

Q What if you're driving by a parolee earlier in the day, stop, and talk to them for community safe, safety purposes?

A Community policing to get him to talk to me, so he knows—

Q What are you automatically search—

[Page 30]

(Talking over one another)

Q It's not automatically. Upon condition of him giving me consent or based on his parole.

A Mr. Samson didn't give you a permission to search?

A No he did not.

MR. LIEBERMAN: Okay.

THE COURT: Was, what was the old call for, do you know? Did you know then?

THE WITNESS: I believe it was domestic violence issue.

THE COURT: Next question. Next question.

MR. LIEBERMAN:

Q The contact you had with him prior, gave rise to recognition, were there any threats to police officers, police?

A That he made toward me?

Q Toward any officers.

THE COURT: When are we talking about? When he was searched?

MR. LIEBERMAN: No initial.

THE COURT: South City?

MR. LIEBERMAN: That gave the ability to recognize—

(Talking over one another).

THE COURT: Oh—

[Page 31]

THE WITNESS: I believe South San Francisco said there were.

MR. LIEBERMAN:

Q Was that in your consciousness when you decided to search Mr. Donald—

A I think officer safety is always in my—

Q You didn't search him for officer safety?

A No. I searched him for parole search.

Q Right. There was something, nothing he was doing while walking along the street, that otherwise gave you probable cause to search him, is that correct?

A No.

Q Didn't appear to be under the influence of controlled substance or anything like that?

A I wasn't able to determine that, because of your defendant.

Q Because of?

A He wouldn't let me.

Q Okay. When you first saw him, though, he was not doing anything to you that appeared to be illegal or inappropriate, is that correct?

A He was just walking down the street.

Q Okay. He was walking with a woman who had a baby?

A Yes.

Q Okay. You searched her, as well, is that

[Page 32]

Correct?

A Yes I did.

Q Why is that?

A I asked her for consent.

Q Why did you do that?

MS. OBERMEYER: Objection. Relevance.

THE COURT: Mr. Lieberman?

MR. LIEBERMAN: My belief is, that he searched him, her, merely because she was walking with Mr. Samson, as the court is aware.

THE COURT: Well—

MR. LIEBERMAN: I'm—

(Talking over one another).

THE COURT: Ground—

MR. LIEBERMAN: I'm addressing the motion on the entire contents of the stop. How the people were treated,

potentially, goes to the issue that's the heart of this motion.

THE COURT: Given the fact that at this point the witness says, she consented, I'll sustain the objection.

Next Question.

MR. LIEBERMAN:

Q So she consented to a search, correct?

A Yes sir.

Q Okay. And you've indicated that it is not your

[Page 33]

regular practice to search all parolers, true?

A I still, again, I don't understand your question.

When you come through, that if I've, I'm out and a parolee, you're asking me, if I search everybody?

Q Yes. Well, when you stop a parolee, do you search everyone that's with him?

MS. OBERMEYER: Objection. Relevance.

THE COURT: Sustained.

MR. LIEBERMAN:

Q How long a period of time past from the time you found out there was no warrant for Mr. Samson until you decided to search him?

A I believe I waited for my cover officer.

Q Okay. Can you tell me how long a period time past?

A I couldn't be able to tell you, honestly.

Q Was it more than two minutes?

A No.

Q More than 10?

A I don't think so.

THE COURT: What did you understand the circumstances of the contract in south San Francisco that you were aware of that involved suppose threats to officers? What did you understand that to be?

[Page 34]

THE WITNESS: That he wouldn't be going back to prison.

THE COURT: He made statements, that in a sense, wasn't going to be taken alive?

THE WITNESS: Police weren't going to take him back to prison.

THE COURT: And you were aware of that when you had this contact that's the subject of this motion?

THE WITNESS: Yes. I was aware of the last time.

THE COURT: When you had the contact that's the subject of this motion to suppress. Okay. The one in San Bruno here with the girlfriend, apparently? With me so far?

THE WITNESS: No. Because we're talking about two incidents.

THE COURT: I know. I'm trying to set the stage here. At the time you searched him and found the methamphetamine —

THE WITNESS: Okay.

THE COURT: That lead to the arrest that's this prosecution —

THE WITNESS: Okay.

THE COURT: At that point, were you, was it in your mind that the defendant had this apparent, this

attitude towards the police when he said, he wasn't going to be taken back to prison?

THE WITNESS: Yes. I recall him being the person that said that.

THE COURT: Okay. That's all I needed to know. Thank you.

MR. LIEBERMAN?

MR. LIEBERMAN:

Q Have any personal animosity to Mr. Samson?

A Not at all.

Q Have an argument with him that day?

A No.

MR. LIEBERMAN: If the court will just give me a moment?

THE COURT: Sure.

MR. LIEBERMAN:

Q Once you determined there was no warrant, did you consider letting him go along his way?

A After a parole search, if he had nothing on him illegal.

Q But again, you wouldn't necessarily search every parolee under those circumstances, would you?

A In four years I've dealt with many parolees, many people on contacts, many people on contacts. I can't tell you if I done it on everybody.

I can tell you regular basis, person, parolee

[Page 36]

or person subject to search and seizure, I would search them.

Q Your first call in was 19-10,1066, is that right?

A That is correct.

Q A suspicious person?

A The code, if I'm going without with a person, anybody, 1066, if I would make a traffic stop, it would be 1186.

Q So just a human being gives rise to 1066 A, I'm unclear if you're making contact with just an individual, that's 1066?

A It's my understanding because of radio traffic, you, I would, my officer orders, I'm going out with this subject, because on parole, and I think re parole warrants, it's to cut traffic on the radio in case of emergency for officer, other officers.

THE COURT: It's a cryptic way of saying, you're contacting somebody that might be a problem, right?

THE WITNESS: No necessarily a person, just, I'm contacting someone. So they know where I'm at in case there's a problem.

THE COURT: You don't give the details. Obviously want to minimize jabbering on the radio, right?

[Page 37]

THE WITNESS: That is correct. Your honor.

THE COURT: Okay. Thank you. Next question.

MR. LIEBERMAN: Nothing further at this time.

THE COURT: Redirect?

MS. OBERMEYER: No your honor.

THE COURT: You may step down officer. Thank you.

THE WITNESS: Thank you.

THE COURT: Good luck in your career.

* * *

[Page 43]

TESTIMONY OF BERNARD MARTINEZ

DIRECT EXAMINATION

BY MS. OBERMEYER:

Q MR. MARTINEZ, by whom are you employed?

A Department of, California Department of Corrections. Department of Parole Division. .

Q What is your position?

A Parole Agent.

Q How long have you been so employed?

A For a year.

Q All right. On September 6th, 2002, were you the parole agent for Donald Samson?

A Yes.

Q And do you see Mr. Sampson here in court today?

A Yes.

Q Could you identify him for the record, where he's seated, and what he's wearing?

A Seated next to the officer, wearing orange.

[Page 44]

THE COURT: Record will reflect the identification of the defendant. he's the only one in the courtroom wearing orange.

MS. OBERMEYER: Thank you your honor.

Q As a condition of parole — strike that.

On September 6th, 2002, was the defendant on parole?

A Yes he was.

Q Okay. And as a condition of parole, did he have a search condition?

A Yes he did.

Q And what was that search condition?

A May be searched at anytime by parole officer, law enforcement officer, without cause, with or without a search warrant at anytime, night or day.

Q All right. And did you bring with you today the notice of conditions of parole?

A Yes I did.

MS. OBERMEYER: May I approach the witness, your honor?

THE COURT: You may.

MS. OBERMEYER: Thank you.

THE COURT: You're welcome.

MS. OBERMEYER: I'm having marked as People's 3, a document note and condition of the parole.

THE COURT: Is this the original copy?

[Page 45]

THE WITNESS: It's a copy.

THE COURT: Okay.

Have you seen it, Mr. Lieberman?

MR. LIEBERMAN: I have not.

THE COURT: You will in a minute.

MS. OBERMEYER: I'm showing Mr. Lieberman Exhibit 3.

MR. LIEBERMAN: Thank you, your honor.

MS. OBERMEYER: You're welcome.

THE DEFENDANT: No, it's not.

(Whereupon People's Exhibit 3 was marked for identification only).

MS. OBERMEYER: Thank you.

Q Mr. Martinez, were you the custodian of this record that's been marked Exhibit 3?

A Yes.

Q And was it made and kept in the normal course of business?

A Yes.

Q Is it made or kept near the time when an event occurs?

A Yes.

Q Um, now I'm showing you People's Exhibit 3. Does it set forth the search condition?

A Yes.

Q Could you read it, please?

[Page 46]

A You've agreed to search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause.

MS. OBERMEYER: Thank you.

People would move People's 3 into evidence at this time.

THE COURT: Any objection, Mr. Lieberman?

MR. LIEBERMAN: It's not the original. I object as hearsay.

THE COURT: Overruled. Be permitted. As you know, hearsay is permitted in a motion to suppress and it sounds like it's — let me back up. I take it that's an exact copy of are original in the file?

THE WITNESS: Yes.

THE COURT: Okay. What is he on parole for?

THE WITNESS: For failing, failure to appear.

THE COURT: Well, that's usually a misdemeanor.

What is the felony that he is convicted of that causes him to be on parole?

THE WITNESS: Possession of a firearm, ex-felon.

THE COURT: 12021?

THE WITNESS: Yes.

THE COURT: Okay. Anything else from the people?

[Page 47]

(Whereupon People's Exhibit 3 was marked and entered into evidence).

MS. OBERMEYER: No your honor.

THE COURT: Cross-examine Mr. Lieberman?

CROSS EXAMINATION

BY MR. LIEBERMAN: Hi. How you doing?

Q Now is Mr. Samson's signature on that form?

A Yes it appears to be.

Q How do you know? You don't know, correct?

A Do I know?

Q That form was purportedly signed in 1999, correct?

A Yes, looks like.

Q You've been his parole agent for a year?

A No.

Q How long have you been a parole agent?

A Approximately five months.

Q Okay. That, so that form is not signed in your presence, correct?

A No it wasn't.

Q Nor do you know if that's his signature, correct?

A No I don't.

Q Okay. And you've been a parole agent for five months. when you were first assigned this case, he was in custody?

[Page 48]

A Yes.

Q Recently finished 10 months time for violation?

A That is correct.

Q When was he released?

THE COURT: We're going to take a five minute recess. Actually, eight minutes, to 20 after, so the witness can review his file and be able to answer all those questions.

MR. LIEBERMAN: Thank you.

MS. OBERMEYER: Thank you, your honor.

(Break).

THE COURT: Back on the record in the matter of People versus Samson.

Witness is on the stand again and Mr. Lieberman.

MR. LIEBERMAN:

Q I believe the question was, when was he last released from CDC?

THE COURT: And you answer?

THE WITNESS: September 2001.

MR. LIEBERMAN: September of 2001.

THE WITNESS: Yes. That's—

THE COURT: Released from parole, released on parole from his initial sentence or released—

THE WITNESS: From violation.

MR. LIEBERMAN:

[Page 49]

Q You indicated to me, you've been his parole agent for five months. When you first became his parole agent, he was in custody?

A He was, he's been passed around so many times. I believe he was, no, he was, he was not in custody. I'm sorry.

Q When you first met him?

A Yes.

Q When was that?

A That was in April.

Q Of?

A 2002.

Q 2002. How many times have you met Mr. Samson?

A I would say oh, three, four times.

Q Okay. And from April 2002 through September of 2002, there were never any warrants on him, is that correct?

A Yes. There was a warrant.

Q When was that warrant?

A On 6/21/02.

Q A warrant issued?

A Yes.

Q He was ultimately placed on, in custody on that warrant, correct?

A Yes.

Q When?

[Page 50]

A On the 6/24/02, he was arrested in the office.

Q Okay. Did he surrender on his warrant?

A Yes.

Q You arrested him?

A Yes.

Q Okay. So he hadn't been released since September of 2001. So you, okay. But you arrested him in June of '02, correct?

A That is correct.

Q On that warrant.

How long was he placed in custody?

A He was released on 8/28/02.

MR. LIEBERMAN: Okay. No further questions.

THE COURT: Redirect?

MS. OBERMEYER: No your honor.

THE COURT: May the witness be excused?

MS. OBERMEYER: Yes.

THE COURT: From the People's perspective?

MS. OBERMEYER: Yes.

THE COURT: Any objection, Mr. Lieberman?

MR. LIEBERMAN: No objection.

THE COURT: Good luck in your career, Mr. Martinez.

* * *

[Page 102]

TESTIMONY OF DEBORAH WATSON

DIRECT EXAMINATION

BY MR. LIEBERMAN: Q. Good morning, ma'am.

A: Good morning.

Q. Do you know this gentlemen sitting to my left?

A. Yes.

Q. And can you — and for the record, can you tell me what he's wearing and what his name is?

A. His name is Donald Samson. He is wearing orange.

Q. Were you with Mr. Samson on September 6?

A. Yes, I was.

Q. Okay. What were the two of you doing?

A. We were on our way down walking towards one of our friend's house, and we were going to go

[Page 103]

borrow one of his friends car to go shopping with my son, Jefferson, which is three years old.

Q. Okay. Remember about what time of day this was?

A. This is probably like around 4:30, around five o'clock.

Q. Okay. And what happened while you were walking with Mr. Samson and your son?

A. We were walking down towards West Angus which is towards — past in front of Artichoke Joe's. We were approached by Officer Alex and another officer with a canine. He, Officer Alex, had come up to both of us asking Donald if he had a warrant for his arrest.

Q. Let me stop you then. When you saw Officer Alex—do you see him in the courtroom?

A. Yes, I do.

Q. Okay. And do you know his full name?

A. I don't know how to pronounce his last name.

Q. Okay. Can you tell me where you see Officer Alex?

A. Right in front of me.

Q. Okay. I would ask the record to reflect right in front of you. Directly in front of you?

[Page 104]

A. Yes.

Q. Okay. I would ask the record to reflect identification of Officer Rohleder?

THE COURT: It will.

MR. LIEBERMAN: Thank you. The officer walked up to you or —

THE WITNESS: He parked his car next to us, and then he got out of his car.

THE COURT: Ma'am, he asked you one simple question, and all you have to do is answer. If there is

anything that needs to be solicited, he will ask you. Okay?

THE WITNESS: Okay.

MR. LIEBERMAN:

Q. Take your time. You speak kind of fast, and it's hard for the court reporter.

A. Okay.

Q. And what was said upon his walking up to you?

A. He said: "Aren't you Donald Samson? Don't you have a warrant for your arrest for domestic violence?

Q. Did Mr. Samson answer?

A. He replied: "What?" Like hesitated, surprised.

Q. What happened next, ma'am?

[Page 105]

A. He had told him to put his hands up on the car and gave him a search.

Q. Okay. Did Mr. Samson comply—

A. Yes.

Q. —with his order?

A. Yes. He did not refuse.

Q. Okay. Did the officer have any contact with his car after that initial search?

A. Excuse me?

Q. Did the officer go to his patrol car after that initial search?

A. I wasn't paying attention to that, no. I was busy attending to my son that was next to me, standing next to me.

Q. Okay. What happened then after he searched Mr. Samson?

A. He told him to take his jacket off, and he threw his coat on top of the hood, and then he had searched his jacket, and then he searched him again a second time, and then he had asked me to stand aside and wait right there with my child.

Q. Did you comply with the officer's request?

A. Yes.

Q. What happened after he was done searching — after he was done searching

[Page 106]

Mr. Sampson again?

A. After I saw Donald, after that he went straight to the police car, after that he had approached me and asked me where we were coming from, where were we going and asked me: What was I doing? He asked me if he was my boyfriend.

Q. Did you answer these questions?

A. Yes, I did, I answered these questions.

Q. Did he say or do anything else to you?

A. He had told me to empty my pockets out. No, he did not ask me for permission. He just told me to empty my pockets out and if I had any weapons or any drugs on me.

Q. Did you empty your pockets?

A. Yes, I did.

Q. Where did you empty your pockets?

A. On the top of the hood of his car.

Q. He told you? He did not ask your permission?

A. No, he had not asked permission. He told my son to step aside and sit on the ground while this was happening, and my son was also crying while this thing was going on.

Q. Your son is how old?

A. Three.

Q. Your son listened to the officer,

[Page 107]

correct?

A. Yes, he did.

Q. So, you emptied your pockets. He asked you some personal questions about whether or not you had a relationship with Mr. Samson; is that correct?

A. Yes.

Q. Are you a girlfriend of Mr. Samson's?

A. No.

Q. What happened after that?

A. Um, that's it. He went through my belongings on the top of the hood of the car and told me to go ahead and proceed to what I was doing, to go ahead with my son, go home.

Q. And did you go home?

A. No. I went to the store to get my son some ice cream.

Q. How do you feel the officer treated you during this contact?

A. I would say he treated me so and so like I was—like I was a criminal. He made me feel like I was—like I did something wrong, like I was a bad guy because I was with my friend. That's how he made me feel.

Q. He didn't physically abuse you?

A. No, he didn't physically abuse me.

[Page 108]

Q. Was he polite to you?

A. Kind of—not really. Kind of like he had a little attitude, but he wasn't really, really very, very cruel.

Q. Did you have any attitude towards him?

A. No.

Q. Okay. Did you comply completely with all his requests and demands?

A. Yes.

Q. One moment please.

MR. LIEBERMAN: No further questions at this time.

THE COURT: Any cross-examination, Miss Obermeyer?

MS. OBERMEYER: Yes, your Honor, briefly.

CROSS-EXAMINATION

BY MS. OBERMEYER: Q: Good morning, Miss Watson.

A. Good morning.

Q. How long have you known the defendant, Mr. Samson?

A. I've known him for at least five years.

Q. And how did you first meet him?

A. I met him through my cousin. His cousin

[Page 109]

is his neighbor.

Q. What did you say, you're friends?

A. Yes.

Q. Would you say you're close friends?

A. Yes.

Q. Were you ever romantically involved with him?

A. No.

Q. Now, you say that you were just walking on the street with Mr. Samson; is that correct?

A. Yes.

Q. And he — that is Officer Rohleder spoke to Mr. Samson; isn't that correct?

A. Yes.

Q. And Officer Rohleder asked whether or not there was an outstanding warrant, isn't that correct?

A. Yes. If he had a warrant, yes.

Q. And Officer Rohleder was—strike that. The defendant, Mr. Samson, acknowledged he was on parole; wasn't that correct?

A. No. He did not say nothing.

Q. You never heard him say that; is that

[Page 110]

correct?

A. No, he didn't say nothing at all to the officer.

Q. Officer Rohleder stated that the defendant was on parole, didn't he?

A. Well, yeah. He said that he was, but no words came out of Donald's mouth at all.

Q. So your testimony is that Mr. Samson never said a word to Officer Rohleder; is that your testimony?

A. Uh-huh. Yes.

Q. Now, Officer Rohleder never threatened you in any way with physical harm, did he?

A. No.

Q. Officer Rohleder didn't push you, did he?

A. Push me? No.

MS. OBERMEYER: Thank you. I have no further questions at this time.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. LIEBERMAN: Q: Were you in a position to hear everything that would have been said between the two of them?

A. Not when he was set in the police car,

[Page 111]

no, and pulled away from me.

Q. Okay. Could you see if there were any conversations going on in the police car?

A. No, I wasn't really paying attention at that time because I had my son that was standing next to me — my three-year-old son and most my of attention went off and on between both of them so . . .

Q. Was your son crying the whole time?

A. Yes. He was crying on the ground while I was emptying my pockets on the hood of the car. My son was crying and he wanted to stand next to me but officer—the officer would not let him come close to me while I was

emptying out my pockets. He wanted my son to be set aside.

THE COURT: Miss Samson, I told you—now this is the third time that I told you, and I'm telling you that there was just a question asked. Only answer it. You have been volunteering which goes to your credibility in this case.

Okay. So if you do it again I'll have do something to you. Understood?

THE WITNESS: Uh-huh.

THE COURT: Is that a yes?

THE WITNESS: Yes.

[Page 112]

THE COURT: Next question.

MR. LIEBERMAN: Q. Did you ask the officer if you could go to your son?

A. No.

Mr. LIEBERMAN: Nothing further.

THE COURT: Any recross?

RECROSS EXAMINATION

BY MS. OBERMEYER: Q. Miss Watson, you'd do what you can to help Mr. Samson, your friend, isn't that correct?

A. Not really. I'm just showing my point of view what I saw and what happened that day.

MS. OBERMEYER: Thank you.

THE COURT: Step outside with that device, sir, and turn it off and you can return.

PERSON FROM THE AUDIENCE: It's off. I apologize for that.

MR. LIEBERMAN: Did the Court get the last question?

THE COURT: No.

MR. LIEBERMAN: Q. Would you be likely to help Mr. Samson?

A. No, I wouldn't.

MR. LIEBERMAN: Nothing further, Judge.

[Page 113]

THE COURT: Hold on, ma'am. Anything else for the People?

MS. OBERMEYER: No. Thank you, Your Honor.

THE COURT: May she be excused, Mr. Lieberman?

MR. LIEBERMAN: Yes, Judge.

THE COURT: Miss Obermeyer, is she free to go?

MS. OBERMEYER: She is.

* * *

[Page 119]

THE COURT: Thank you.

The Court has reviewed the evidence and has heard the tape recording, reviewed the documents filed herein and observed the demeanor and assessing it, the Court finds as follows, that the defendant was on parole subject to search and seizure. That the officer had a basis in his mind to stop the defendant, while erroneous, it wasn't arbitrary or capricious. The act of searching him

[Page 120]

was within his power given the nature of the defendant's parole offense, namely, ex-felon in possession of a firearm

and was certainly prudent to make the search, not only for the protection, itself, but to make sure that parolee is not in violation of the law, which, as it turns out, he was finding dope, and I don't find that his actions were capricious or arbitrary, and therefore, I deny the motion based upon the credibility and evidence of the witnesses.

* * *

Trial Testimony

Testimony of Officer Rohleder

DIRECT EXAMINATION

[Page 81]

Q All right. An finally People's Exhibit 2F what does that photo show?

A This is the same sidewalk that we've been talking about in the last three photos, but it's taken from the angle on the exact opposite of this street, so you're seeing the southwest side.

Q All right. And how would you describe what kind of area People's Exhibit 2A through F shows?

A I'd say it's a right on the border of a business slash residential area.

Q What kind of businesses as well as other kind of buildings are there?

A Okay. Just west of this is going to be San Mateo Avenue which is our main downtown district which all the stores are, there's a 7-Eleven here, right across the street from the casino, along this side is a long parking lot and on the east side of the parking lot is all residential area.

Q All right. And is this a through wear between

[Page 82]

the stores of San Mateo Avenue and then the residential area?

A I'd say it's one of our busiest areas in the city.

Q All right. And when you say residential, are those family homes?

A Yes.

Q And is there a school in the area?

A There is a school, approximately four—four blocks, at least of this area here.

* * *

CROSS EXAMINATION

[Page 88]

Q Prior to Officer Guldner arriving, did you conduct just a limited pat-down?

A Yes, I'm sure I did, for weapons.

Q Okay. And for the jury's benefit, a pat-down search is different than a full-blow search; is that correct?

A That's correct.

Q Okay. Describe what a pat-down search is to

[Page 89]

me, please.

A I would just generally pat down his pockets, waistband behind maybe his jacket right here.

Q And that's done, is it not, just to make sure the person doesn't have any weapons or something like that?

A For my safety, yes.

Q Okay. So you did conduct that very limited search before Officer Guldner arrived?

A A pat-down, yes.

Q Okay. You didn't find any weapons; correct?

A No, I did not.

Q And the drugs—you've testified in court, you didn't find them during that pat-down search; is that also correct?

A That's correct.

* * *

Supreme Court, U.S.
FILED
NOV 28 2005
OFFICE OF THE CLERK

(D)

No. 04-9728

IN THE

Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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NOVEMBER 28, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Does the Fourth Amendment prohibit police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT 11

I. Suspicionless, Nonconsensual, Discretionary Searches Of Parolees By Police Officers Are Unreasonable. 11

A. Parolees' Privacy Interests Receive A Degree Of Protection Under The Fourth Amendment. 12

B. California's Suspicionless Search Regime Extinguishes Parolees' Privacy Interests And Seriously Intrudes Upon The Privacy Of Third Parties. 16

C. California's Search Regime Gives Individual Law Enforcement Officers Unconstrained Discretion To Conduct Suspicionless Parolee Searches. 17

D. Suspicionless, Nonconsensual Parolee Searches By Law Enforcement Officers Are Not Needed To Advance Government Interests. 22

1. Suspicionless Searches By Law Enforcement Officers Are An Obstacle To Parolees' Reintegration Into The Community. 23

2. Blanket Suspicionless Searches By Law Enforcement Officers Do Not Significantly Advance the State's Law Enforcement Interest. 24

II. The "Special Needs" Doctrine Does Not Justify The Search In This Case. 32

A. Suspicionless Searches Cannot Be Justified Under The "Special Needs" Doctrine Unless They Are "Divorced From The State's General Interest In Law Enforcement." 33

B. The Search In This Case Was Undertaken By A Law Enforcement Officer For A Law Enforcement Purpose. 35

III. The "Consent" Rationale Does Not Apply To The Search In This Case. 39

CONCLUSION 42

Appendix A: Constitutional And Statutory Provisions Involved 1a

Appendix B: State Parole and Probation Search Conditions 12a

TABLE OF AUTHORITIES

CASES

Page(s)

Adams v. *Williams*, 407 U.S. 143 (1972) 26
Alabama v. *White*, 496 U.S. 325 (1990) 26
Blakely v. *Washington*, 542 U.S. 296 (2004) 7
Bumper v. *North Carolina*, 391 U.S. 543 (1968) 41
Camara v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967) 33
Chandler v. *Miller*, 520 U.S. 305 (1997) 11
City of Indianapolis v. *Edmond*, 531 U.S. 32 (2000) ..... *passim*
Delaware v. *Prouse*, 440 U.S. 648 (1979) 17, 18, 34
Dunaway v. *New York*, 442 U.S. 200 (1979) 21
Escoe v. *Zerbst*, 295 U.S. 490 (1935) 13
Ferguson v. *City of Charleston*, 532 U.S. 67 (2001) ..... *passim*
Florida v. *Wells*, 495 U.S. 1 (1990) 18
Florida v. *Royer*, 460 U.S. 491 (1983) 19
Fox v. *State*, 527 S.E.2d 847 (Ga. 2000) 29
Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 13
Griffin v. *Wisconsin*, 483 U.S. 868 (1987) ..... *passim*
Horton v. *California*, 496 U.S. 128 (1990) 21
Hudson v. *Palmer*, 468 U.S. 517 (1984) 14
Illinois v. *Wardlow*, 528 U.S. 119 (2000) 26
INS v. *Delgado*, 466 U.S. 210, 217 (1984) 26
Knox v. *Smith*, 342 F.3d 651 (7th Cir. 2003) 15
Lanza v. *New York*, 370 U.S. 139 (1962) 14
Michigan v. *Tyler*, 436 U.S. 499 (1978) 34
Michigan Dep't of State Police v. *Sitz*, 496 U.S. 444 (1990) 34
Minnesota v. *Murphy*, 465 U.S. 420 (1984) 41
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 12, 13, 38
New Jersey v. *T. L. O.*, 469 U.S. 325 (1985) 19, 38
New York v. *Burger*, 482 U.S. 691 (1987) 34

Owens v. *Kelley*, 681 F.2d 1362 (11th Cir. 1982) 29
Payton v. *New York*, 445 U.S. 573 (1980) 18
Pennsylvania Board of Probation and Parole v. *Scott*, 524 U.S. 357 (1998) 10, 14, 26, 38
People v. *Bravo*, 738 P.2d 336 (1987) 41
People v. *Burgener*, 714 P.2d 1251 (Cal. 1986) 6, 17
People v. *Delong*, 2004 WL 902118 (Cal. Ct. App., Apr. 28, 2004) 20
People v. *Guzman*, 107 P.3d 860 (Cal. 2005) 3, 40
People v. *Lewis*, 74 Cal. App. 4th 662 (Cal. Ct. App. 1999) 4, 40
People v. *McCullough*, 6 P.3d 774 (Colo. 2000) 29
People v. *Reyes*, 968 P.2d 445 (Cal. 1998) 3, 6, 10, 20, 21, 39
People v. *Robles*, 3 P.3d 496 (Cal. 2000) 24
People v. *Sanders*, 73 P.3d 496 (Cal. 2003) 24
People v. *Woods*, 981 P.2d 1019 (Cal. 1999) 17, 22, 36
Riley v. *Commonwealth*, 120 S.W.3d 622 (Ky. 2003) 15
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) 39
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 33
State v. *Devore*, 2 P.3d 153 (Idaho Ct. App. 2000) 29
State v. *Maurstad*, 647 N.W.2d 688 (N.D. 2002) 29
State v. *Smith*, 589 N.W.2d 546 (N.D. 1999) 29
State v. *Zeta Chi*, 696 A.2d 530 (N.H. 1997) 29
Terry v. *Ohio*, 392 U.S. 1 (1968) 16, 17, 19, 23
United States v. *Crawford*, 372 F.3d 1048 (2004) 40
United States v. *Knights*, 534 U.S. 112 (2001) ..... *passim*
United States v. *Leon*, 468 U.S. 897 (1984) 38
United States v. *Loney*, 331 F.3d 516 (6th Cir. 2003) 15
United States v. *Martinez-Fuerte*, 428 U.S. 543 (1976) 16
United States v. *Montoya de Hernandez*, 473 U.S. 531 (1985) 19, 21

United States v. *Matlock*, 415 U.S. 164 (1974) 17
United States v. *Sokolow*, 401 U.S. 1 (1971) 26
United States v. *Tucker*, 305 F.3d 1193 (10th Cir. 2002) 15
United States v. *Williams*, 417 F.3d 373 (3d Cir. 2005) 15
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 33, 35
Treasury Employees v. *Von Raab*, 489 U.S. 656 (1989) 33
Vernonia School Dist. 47J v. *Acton*, 515 U.S. 646 (1995) 33
Warden v. *Hayden*, 387 U.S. 294 (1967) .....
Whren v. *United States*, 517 U.S. 806 (1996) 21
Wyoming v. *Houghton*, 526 U.S. 295 (1999) 11
Zap v. *United States*, 328 U.S. 624 (1946) 39

STATUTES & REGULATIONS

Cal. Penal Code § 3000 ..... 1, 2, 23
Cal. Penal Code § 3000.1 2
Cal. Penal Code § 3001 2
Cal. Penal Code § 3060.5 3
Cal. Penal Code § 3063 35
Cal. Penal Code § 3067 3
Cal. Penal Code § 3074 3
Cal. Penal Code § 3075 3
Cal. Penal Code § 3076 3
Cal. Penal Code § 3088 3

28 C.F.R. § 2.40 30
28 C.F.R. § 2.204 30
28 C.F.R. § 2.200 30

Cal. Code Regs. tit. 15, § 2511 ..... 2, 16
Cal. Code Regs. tit. 15, § 2512 ..... 2, 40

OTHER

Cal. Dep't Corr. Admin. Bull. No. 93/15 (1993) 4
Joan Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?*, 62 Federal Probation 3 (Dec. 1998) 31
U.S. Parole Comm'n R. & Proc. Man. 30, 31
Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004) 13-14, 37, 41

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division One (J.A. 9-29) is unreported.

JURISDICTION

The judgment of the Court of Appeal was entered on October 14, 2004. J.A. 9. The California Supreme Court denied a petition for review on January 12, 2005. J.A. 30. The petition for a writ of certiorari was filed on April 12, 2005, and granted on September 27, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States and relevant portions of §§ 3000, 3000.1, 3001, and 3607 of the California Penal Code and §§ 2511 and 2512 of the California Code of Regulations are reprinted in Appendix A to this brief. *See* App. A, *infra*, 1a-11a.

STATEMENT

1. California's Parole System. The California legislature has determined that "the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship." Cal. Pen. Code § 3000(a)(1). In order to "provide for the supervision of and surveillance of parolees," and "to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge," California law requires that "[a] sentence pursuant to Section 1168 or 1170 [the general sentencing provisions of

the California Penal Code] shall include a period of parole, unless waived as provided in this section." *Id.*

The period of parole lasts up to three years for certain offenses, and up to five years for others. *Id.* § 3000(b)(1), (2). If a person receives a life sentence and is subsequently paroled, the period of parole is five years, and may be extended for an additional five years. *Id.* § 3000(b)(3). In the case of a person sentenced for first or second degree murder, "the period of parole, if parole is granted, shall be the remainder of the person's life." *Id.* § 3000.1(a).

Parolees may be discharged from parole before their periods of parole have been completed. Discharge occurs after one year if the parolee was convicted of a nonviolent felony, and after two or three years for most other felonies, unless the Board of Prison Terms determines that the person should be retained on parole for a longer period. *Id.* § 3001(a), (b). Persons subject to lifetime parole are discharged after five years (in the case of second-degree murder) or seven years (in the case of first-degree murder), unless the Board determines that they should be retained on parole. *Id.* § 3000.1(b).

2. The Parole Search Condition. California law provides for a "notice of parole," which is "a general description of rules and regulations governing parole." Cal. Code Regs. tit. 15, § 2511(a). By statute, "[t]he notice of parole shall read as follows: . . . Search. You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer." *Id.* § 2511(b).

California law specifies that "parole conditions are not a contract but are the specific rules governing all parolees whether or not the parolee has signed the form containing the parole conditions." *Id.* § 2512(a). California law nevertheless provides that "[a]ny inmate

who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Cal. Penal Code § 3067(a). An inmate who does not so agree loses "worktime credit on a day-for-day basis and shall not be released until he or she either complies with the provision of subdivision (a) or has no remaining worktime credit, whichever occurs earlier." *Id.* § 3067(b). Another provision of California law provides that "the parole authority shall revoke the parole of any prisoner who refuses to" take any of several specified actions, including "sign[ing] a parole agreement setting forth the general and any special conditions applicable to the parole." *Id.* § 3060.5. Confinement under this provision may not exceed six months except in certain circumstances. *Id.*[1]

The California Supreme Court has held that the net effect of these provisions is that "parole is not a matter of choice. The Board of Prison Terms must provide a period of parole; the prisoner must accept it. Without choice, there can be no voluntary consent to inclusion of the search condition." *People* v. *Reyes*, 968 P.2d 445, 448 (Cal. 1998) (citation omitted). *See also People* v. *Guzman*, 107 P.3d 860, 867 (Cal. 2005) (parole

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[1] The provisions of the California Penal Code discussed in the text apply to the state-administered parole system. Separately, California counties supervise parolees from county and city correctional institutions. Cal. Pen. Code §§ 3074, 3076. California law requires each county to establish a Board of Parole Commissioners, and each county board makes rules under which prisoners in county and city prisons may be paroled. *Id.* §§ 3075, 3076. California law does not require any particular conditions of county parole other than that parole be supervised. *Id.* § 3088. Some county parolees are thus subject to a search condition, while others are not. *See* Brief of California Public Defenders Association as *Amici Curiae* at 5-6.

in California is "mandatory from the offender's perspective"); J.A. 10-11 n.3 (quoting *People* v. *Lewis*, 74 Cal. App. 4th 662, 668 (Cal. Ct. App. 1999) (search conditions "are now automatic, and imposed on every parolee")).

3. The Search of Petitioner. On September 6, 2002, at about 5:30 in the afternoon, Officer Alex Rohleder of the San Bruno, California Police Department was driving his patrol vehicle when he observed "two adults and a little baby walking down the street." J.A. 10, 31. The two adults were Petitioner and his friend Deborah Watson; the "baby" was Ms. Watson's three-year-old son. J.A. 10-11, 60. Petitioner and his companions were walking along a busy thoroughfare between a residential area and a major shopping area, near "family homes" and a school. J.A. 64-65.

Officer Rohleder was not actively looking for Petitioner, but "just happened to run across him." J.A. 34. The officer recognized Petitioner "from a prior contact." J.A. 10, 32. Officer Rohleder was aware that Petitioner was on parole, and "was under the impression that he might have a parolee at large warrant." *Id.*[2] The officer parked his patrol vehicle and "made contact" with Petitioner. J.A. 10, 32.

The officer conducted a pat-down search of Petitioner for weapons and found nothing. J.A. 65. The officer asked Petitioner whether he had an outstanding warrant. J.A. 10, 32. Petitioner responded "no, he didn't" and stated that "he was in good standing with his parole agent." *Id.* The officer called his dispatcher and

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[2] In California, a "parolee at large" warrant is issued when "a parolee's whereabouts are unknown, or [] he/she has remained unavailable for supervision." Cal. Dep't Corr. Admin. Bull. No. 93/15 (1993) ("Revised Parolee At Large Warrant Procedure").

confirmed that Petitioner's statements were correct. J.A. 10, 38.

The police officer then proceeded to search Petitioner more thoroughly. J.A. 33. The officer conducted this second search of Petitioner solely "[b]ecause it's a condition of his parole." J.A. 37. Petitioner, like other parolees in California, was subject to a search condition that provided: "You've agreed to search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause." J.A. 48. "The warrantless search was predicated entirely upon the [Petitioner's] parole status." J.A. 14. Nothing about Petitioner's conduct gave rise to any suspicion that he was engaged in wrongdoing. J.A. 41. The search was not justified by "officer safety" concerns, and Petitioner did not consent to the search. J.A. 38, 40.

Officer Rohleder testified that he searches parolees on a "regular basis," but "I don't go after everybody all the time." J.A. 39, 44. The officer explained that, "being [a] parolee," Petitioner "needs to make sure he's still obeying the laws. It's a privilege for him to be out there." J.A. 38.

The officer searched Petitioner's pockets and found a "cigarette box in his left breast pocket." J.A. 33. The officer searched inside the cigarette box and found "a plastic baggy containing Methamphetamine." *Id.* The officer immediately arrested Petitioner. *Id.*

The officer also searched Petitioner's companion, Deborah Watson. J.A. 11. According to the officer, Ms. Watson consented to the search. *Id.* According to Ms. Watson, the officer did not ask permission to search her, but instead told her to empty her pockets and asked if she had any weapons or drugs. J.A. 11, 56. After the officer went through Watson's belongings on top of the hood of the car, he told her to "go home." J.A. 11, 57.

4. The Proceedings Below. Petitioner was charged with possession of methamphetamine. In the trial court, he moved to suppress the drugs as the product of an illegal search. J.A. 9. The trial court denied Petitioner's motion. Petitioner was found guilty of possession of methamphetamine and sentenced to seven years' imprisonment. J.A. 8.

On appeal, Petitioner contended that the officer did not conduct a valid parole search. He argued that the search was not justified by any individualized suspicion that he was engaged in criminal activity, and that the search was arbitrary, capricious, and harassing. J.A. 12.

The court of appeal rejected both arguments. As to the first argument, the California Supreme Court held in *People* v. *Reyes*, 968 P.2d 445 (Cal. 1998), that "an adult parolee subject to a search condition could be searched even if the searching officers did not have a reasonable suspicion that the parolee had violated or was planning to violate either the law or the conditions of parole." J.A. 12. *Reyes* overruled an earlier decision of the California Supreme Court, which held that "the appropriate standard of reasonableness to justify a parole search is a reasonable suspicion on the part of the parole officer that the parolee is again involved in criminal activity, or has otherwise violated his parole, and that the search may turn up evidence of that activity." *People* v. *Burgener*, 714 P.2d 1251, 1271 (Cal. 1986). The court of appeal noted that, as an intermediate appellate court, it was bound to follow the California Supreme Court's decision in *Reyes*. J.A. 13. The court of appeal "therefore conclude[d] that the parole search of defendant did not require a particularized suspicion of criminal activity." J.A. 13 (citation omitted).

The court of appeal also held that the search was not arbitrary, capricious, or harassing. J.A. 13-14. The court concluded that the officer identified "a legitimate law enforcement purpose" for the search ("to determine

whether [Petitioner], as a parolee, was 'still obeying the laws'"). J.A. 14. The court also concluded that the officer's testimony that "he customarily searches identified parolees does not demonstrate arbitrariness, and indicates that the search was not conducted by the officer for the purpose of harassment or due to any personal animosity toward the defendant." *Id.*[3]

Petitioner filed a petition for review with the California Supreme Court, which denied the petition. J.A. 30.

SUMMARY OF THE ARGUMENT

1. A search ordinarily is unreasonable in the absence of individualized suspicion of wrongdoing. In deciding whether a search falls within the closely guarded category of constitutionally permissible suspicionless searches, the Court balances the degree to which the search intrudes on individual privacy interests against the degree to which it is needed to promote legitimate government interests. That balancing analysis leads to the conclusion that suspicionless searches of parolees by law enforcement officers are unreasonable.

The State's interest in supervising probationers (and, by extension, parolees) "permit[s] a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Griffin* v. *Wisconsin*, 483 U.S. 868, 875 (1987). But "[t]hat permissible degree is not unlimited," and may be "exceeded." *Id.* *See also United States* v. *Knights*, 534 U.S. 112, 121 (2001) ("When an officer has reasonable

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[3] The court of appeal also rejected Petitioner's argument that his sentence was unlawful under *Blakely* v. *Washington*, 542 U.S. 296 (2004), and directed the trial court to award Petitioner three additional days of sentence credits. J.A. 14-28.

suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion into the probationer's significantly diminished privacy interests is reasonable.").

A regime of suspicionless, nonconsensual parolee searches virtually extinguishes parolees' privacy interests, contrary to this Court's recognition that parolees' privacy interests are diminished but not extinguished. Moreover, parolee searches seriously intrude upon the privacy interests of third parties. California's search regime gives individual law enforcement officers unconstrained discretion to conduct parolee searches. The Court has repeatedly held that it is unreasonable to give police officers unbridled discretion to make even brief stops, let alone extensive searches, in the absence of any individualized suspicion of wrongdoing.

California's requirement that parolee searches not be "arbitrary," "capricious," or "harassing" is both ineffective as a limitation on parolee searches and inconsistent with this Court's Fourth Amendment decisions. This Court has been reluctant to create additional standards of reasonableness, beyond the established "probable cause" and "reasonable suspicion" standards. California's standard also requires an inquiry into the officer's subjective purpose, contrary to this Court's decisions that the subjective intentions of individual law enforcement officers generally play no role in Fourth Amendment analysis.

A blanket regime of suspicionless parolee searches does not significantly advance the State's legitimate interests, and certainly does not warrant such an extreme intrusion upon privacy interests. Suspicionless searches are likely to undermine the State's interest in reintegrating parolees into society. Subjecting parolees to unrestricted searches that may inflict great indignity and arouse strong resentment, in the absence of even minimal

suspicion of wrongdoing, is not likely to promote reintegration of the parolee into society at large. And because suspicionless searches result in intrusions upon the privacy rights of third parties who share a home with parolees, they may prevent parolees from finding suitable housing and forming close relationships.

While the State has a strong interest in preventing parolees from engaging in criminal conduct, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 42 (2000). States have great flexibility to search parolees without subjecting them to a blanket regime of suspicionless searches. Parole officers or police officers may search a parolee's home without a search warrant or probable cause. The relatively undemanding "reasonable suspicion" standard requires only some minimal level of objective justification. And any evidence discovered in a parolee search may be used to revoke parole even if it is not admissible in a criminal trial.

States may also seek to adopt other means of supervising and searching parolees short of the extreme search regime adopted by California. For example, a state may argue that it is reasonable for a judge or parole board to impose a suspicionless search condition based upon consideration of the individual's circumstances. Or a state may seek to justify suspicionless searches by parole officers pursuant to the State's "special needs" beyond ordinary law enforcement. Or the State may argue that a parolee has knowingly and voluntarily consented to the search.

Indeed, nearly every other State and the Federal Government do *not* authorize police to conduct unlimited suspicionless, nonconsensual, searches of parolees. The experience of these other jurisdictions confirms that governments have effective means to advance their

legitimate interests in supervising and searching paroles, and do not need to impose an unlimited regime of suspicionless searches by police officers.

2. The "special needs" doctrine does not justify the search in this case. That doctrine cannot be used to justify a suspicionless search unless "the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement," and there was "little, if any, entanglement with law enforcement." *Ferguson* v. *City of Charleston*, 532 U.S. 67, 79 & n.15 (2001); *see also Edmond*, 531 U.S. at 32.

The Court applied ordinary Fourth Amendment analysis rather than "special needs" analysis in *Knights*, and the same analytical framework applies in this case. Here, as in *Knights*, the search was undertaken by a law enforcement officer without a probation or parole officer. Police officers are "engaged in the often competitive enterprise of ferreting out crime"; parole officers, in contrast, have "a relationship with parolees that is more supervisory than adversarial," and are responsible for assisting parolees, offering them guidance, and trying to guide them into constructive development. *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 368 (marks and citation omitted). Like *Knights*, this case "simply does not fit within the closely guarded category of 'special needs.'" *Ferguson*, 532 U.S. at 84.

3. Finally, the search in this case cannot be justified under a "consent" rationale. The Supreme Court of California has held that "[t]he consent exception to the warrant requirement may not be invoked to validate the search of an adult parolee." *Reyes*, 968 P.2d at 448. In California "parole is not a matter of choice. The Board of Prisons must provide a period of parole; the prisoner must accept it. Without choice, there can be no voluntary consent to inclusion of the search condition." *Id.* (citation omitted). The California Supreme Court is the final

authority on matters of California law, and therefore the "consent" rationale is inapplicable.

ARGUMENT

I. Suspicionless, Nonconsensual, Discretionary Searches Of Parolees By Police Officers Are Unreasonable.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV. "The touchstone of the Fourth Amendment is reasonableness." *Knights*, 534 U.S. at 118-19. "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Edmond*, 531 U.S. at 37 (citing *Chandler* v. *Miller*, 520 U.S. 305, 308 (1997)). Accordingly, this Court has "closely guarded" the category of "constitutionally permissible suspicionless searches." *Ferguson*, 532 U.S. at 77.

"[T]he reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118-19 (quoting *Wyoming* v. *Houghton*, 526 U.S. 295, 300 (1999)). "[I]n determining whether individualized suspicion is required, [the Court] must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue." *Edmond*, 531 U.S. at 42-43.

The search in this case falls outside the "closely guarded" category of constitutionally permissible suspicionless searches. A police officer, exercising

unconstrained discretion, stopped and searched Petitioner as he was "walking down the street." J.A. 31, 41. Petitioner was not doing anything that appeared to be illegal or inappropriate. J.A. 41. He did not consent to the search, and the search was not based on concern for the officer's safety. J.A. 38, 54. The sole basis for the search was Petitioner's status as a parolee. J.A. 37. Such searches are unreasonable because they result in an extreme intrusion upon privacy interests and they are not needed to advance the government's legitimate interests.

A. Parolees' Privacy Interests Receive A Degree Of Protection Under The Fourth Amendment.

The Court has recognized that a person's status as a parolee significantly diminishes, but does not extinguish, his expectation of privacy under the Fourth Amendment. In *Griffin*, the Court stated that "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" 483 U.S. at 873. The Court observed that "[t]o a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'" *Id.* at 874 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972)). The Court held in *Griffin* that probationer supervision "is a 'special need' of the State" that justifies a probation officer's search of a probationer's home based upon "reasonable grounds" that the home contains contraband. *Id.* at 875. But in holding that supervision of probationers "permit[s] a degree of impingement upon privacy that would not be constitutional if applied to the public at large," the Court expressly stated: "That permissible degree is not unlimited," and may be "exceeded." *Id.*

Griffin cited *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), which recognized that a parolee's "condition is very different from that of confinement in a prison." *Id.* at 482. In *Morrissey*, the Court said:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life.

Id. at 482. For these reasons, the Court concluded, "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty." *Id.* Termination of parole "inflicts a 'grievous loss' on the parolee and often on others." *Id.*[4]

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[4] In *Morrissey* the Court held that "[i]t is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.'" 408 U.S. at 482. *Morrissey* thus rejected the theory, suggested in dicta in *Escoe* v. *Zerbst*, 295 U.S. 490, 492-93 (1935), that parole is an "act of grace" that may be "coupled with such conditions . . . as [government] may impose." *See Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 n.4 (1973) ("It is clear . . . that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe* v. *Zerbst* the probation is an 'act of grace.'"). *Morrissey* also noted that a parolee, like a prisoner, "is often formally described as being 'in custody,'" but flatly rejected the argument that "summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody." 408 U.S. at 483. *See also* 5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth* (...continued)

The Court's decisions in *Griffin* and *Morrissey* recognize a constitutional distinction between parolees and probationers on the one hand, and prison inmates on the other. In *Hudson* v. *Palmer*, decided shortly before *Griffin*, the Court held that prison inmates have *no* reasonable expectation of privacy. 468 U.S. 517, 525-526 (1984) ("[T]he Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."). In reaching that conclusion, the Court observed that "[a] prison 'shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room.'" *Id.* at 527 (quoting *Lanza* v. *New York*, 370 U.S. 139, 143-44 (1962)).

In *Pennsylvania Board of Probation & Parole* v. *Scott*, the Court held that the exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights. 524 U.S. 357, 365 (1998). The Court's opinion in *Scott* is based on a recognition that parolees have Fourth Amendment rights that may be violated by unreasonable searches.

Most recently, in *Knights*, the Court held that "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." 534 U.S. at 121. The Court added: "The same circumstances that lead us to conclude that reasonable suspicion is constitutionally sufficient also render a

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Amendment § 10.10, at 434-42 (4th ed. 2004) (concluding that "constructive custody," "act of grace" and "waiver" theories of parolee searches are all unsound); Brief of NACDL as *Amicus Curiae*, at 11-16 (explaining that each of these theories is inapplicable).

warrant requirement unnecessary." *Id.* As in *Griffin* and *Morrissey*, the Court's decision placed persons on probation or parole in an intermediate status under the Fourth Amendment, with less protection than citizens at large but more protection than prisoners.[5]

In *Knights*, the Court stated that the probationer's reasonable expectation of privacy was "significantly diminished" because the probation order "clearly expressed the search condition and Knights was unambiguously informed of it." 534 U.S. at 119-20. Although notice of the government's intentions is undoubtedly a significant aspect of reasonable expectations, a government notice asserting authority to search cannot by itself determine the extent of a person's reasonable expectations of privacy. Otherwise, government officials could engage in unlimited searches and seizures, subject only to the requirement that they provide clear and unambiguous notice of their intentions. *See id.* at 120 n.6 (noting that although the terms of Knights's probation condition permitted suspicionless searches, the Court would not decide whether such searches would violate the Fourth Amendment).

In sum, this Court's decisions recognize that the privacy expectations of persons on parole and probation, while significantly diminished, receive a degree of protection under the Fourth Amendment.

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[5] Courts have applied the holding of *Knights* to parolees as well as probationers. *See, e.g., United States* v. *Williams*, 417 F.3d 373, 376 & n.1 (3d Cir. 2005); *Knox* v. *Smith*, 342 F.3d 651, 657 (7th Cir. 2003); *United States* v. *Loney*, 331 F.3d 516, 520-21 (6th Cir. 2003); *United States* v. *Tucker*, 305 F.3d 1193, 1199 (10th Cir. 2002); *Riley* v. *Commonwealth*, 120 S.W.3d 622, 627 (Ky. 2003).

B. California's Suspicionless Search Regime Extinguishes Parolees' Privacy Interests And Seriously Intrudes Upon The Privacy Of Third Parties.

California's suspicionless parolee search regime intrudes upon individual privacy to an extreme degree. The Court has observed that even a limited pat-down search for weapons is "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment" and therefore "is not to be undertaken lightly." *Terry* v. *Ohio*, 392 U.S. 1, 17 (1968). The search in this case—which was preceded by a pat-down search for weapons—was considerably more intrusive. The police officer searched all of Petitioner's pockets, required Petitioner to remove his jacket, and then searched the jacket. J.A. 56. The officer removed the items he found in the pockets and searched them as well. J.A. 56. The search took place on a busy thoroughfare in front of Petitioner's companions, Ms. Watson and her three-year old child. J.A. 55-56, 64.

California's parole search condition permits police officers to search not only the parolee's person, but also the parolee's home and property. Cal. Code Regs. tit. 15, § 2511(b)(4) ("You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer."). Pursuant to this condition, any law enforcement officer may search at any hour of the day or night for no reason except that the person is on parole. Police officers are thus free to invade "the sanctity of private dwellings" at will, even though the home is "ordinarily afforded the most stringent Fourth Amendment protection." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

California's suspicionless search regime also results in serious invasions of the privacy rights of persons who live with parolees. In *People* v. *Burgener*, the

California Supreme Court noted that "the authority to search the residence of a parolee extends to areas which are jointly controlled with other occupants of the residence." 714 P.2d 1251, 1269 (Cal. 1986), citing *United States* v. *Matlock*, 415 U.S. 164, 170-71 (1974). Consequently, the court observed, a regime of suspicionless searches of parolees' homes "necessarily portends a massive intrusion on the privacy interests of third persons solely because they reside with a parolee." 714 P.2d at 1269. The Court cited the privacy rights of third persons as one of the considerations weighing against suspicionless searches of parolees. *Id.*

Shortly after the California Supreme Court overruled *Burgener* and authorized suspicionless searches of parolees, its observation concerning the privacy rights of third parties was validated. In *People* v. *Woods*, 981 P.2d 1019, 1021 (Cal. 1999), the California Supreme Court upheld the introduction of "incriminating evidence against a third party residing in the house" shared by a probationer, even though the "sole reason for searching the residence was to discover evidence against" the probationer's housemate, who was not on probation. *Id.* at 1023.

C. California's Search Regime Gives Individual Law Enforcement Officers Unconstrained Discretion To Conduct Suspicionless Parolee Searches.

The Court has held that "[t]o insist neither upon an appropriate factual basis for suspicion . . . nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches.'" *Delaware* v. *Prouse*, 440 U.S. at 661 (quoting *Terry*, 392 U.S. at 22). Under California's suspicionless search regime, not even an "inarticulate hunch" is required. California grants to individual law enforcement officers precisely the

"'standardless and unconstrained discretion'" that this Court consistently has rejected. *Edmond*, 531 U.S. at 39 (quoting *Prouse*, 440 U.S. at 661). Indeed, California's grant of unfettered authority to law enforcement officers to search whenever and wherever they wish resembles the general warrants and writs of assistance that gave rise to the Fourth Amendment. *See Payton* v. *New York*, 445 U.S. 573, 583 n.20 (1980) ("[G]eneral warrants[,] known as writs of assistance," gave authorities "blanket authority to search where they pleased," and were denounced because they "they placed the liberty of every man in the hands of every petty officer." (citations and marks omitted)). *See also* Brief of NACDL as *Amicus Curiae*, at 16-18 (discussing general warrants).

In *Prouse*, the Court held that that the Fourth Amendment forbids police spot-checks of vehicle registration without any suspicion of wrongdoing. 440 U.S. at 661. The Court described the officer's "unbridled discretion" as an "evil" that requires the "discretion of the official in the field be circumscribed, at least to some extent." *Id.* California does not circumscribe the officer's discretion to any extent. Under California's regime, each law enforcement officer is free to decide, without any objective basis or guidance from a court, parole officer, supervisor, or regulation, whether to search a particular parolee. The officer has equally unfettered discretion to decide where to search, when to search, what to search for, and how hard to look. Such unconstrained discretion is unreasonable. *See Id.*; *Florida* v. *Wells*, 495 U.S. 1 ("unconstrained discretion" is forbidden) (1990); *Edmond*, 531 U.S. at 49-50 (Rehnquist, C.J., dissenting) (explaining that the Court has viewed standardized operation of roadblocks as "markedly different from roving patrols, where the unbridled discretion of officers in the field could result in unlimited interference with motorists' use of the highways").

Similarly, the Court has insisted that the scope of a search must be "strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry*, 329 U.S. at 19 (marks and citation omitted). Thus, in cases that permit searches or seizures based on reasonable suspicion rather than probable cause, the Court has limited the scope of the search to the extent necessary to dispel the suspicion. In *Terry*, the Court required that a weapons frisk "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." 392 U.S. at 29. In *New Jersey* v. *T. L. O.*, the Court held that a search of a student "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U.S. 325, 342 (1985). And in *Florida* v. *Royer*, the Court held that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." 460 U.S. 491, 500 (1983).

In California, however, the sole circumstance that justifies a parolee search is the fact that the individual is on parole. It is not necessary for the officer to know the offense the parolee committed, or any other fact save that the individual is a parolee. For example, if law enforcement officers reasonably suspect that a person is a "balloon swallower" (a person who attempts to transport illegal drugs in his alimentary canal), it may be reasonable to subject the person to a highly invasive search. *See United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985) (upholding detention at the U.S. border for 16 hours, followed by a body cavity search, based upon reasonable suspicion that the detainee was a balloon swallower). Under California's search regime, highly invasive searches, such as strip searches and body cavity searches, are reasonable so long as they are performed on a parolee, whether or not the particular parolee being

searched is likely to be concealing drugs or other contraband on her body.

The California Supreme Court has attempted to address some of these problems by holding that a suspicionless parolee search is unlawful if it is "arbitrary and capricious" because "the motivation for the search is unrelated to rehabilitative, reformative, or legitimate law enforcement purposes," because it is "motivated by personal animosity toward the parolee," or because it is undertaken by police "at their whim or caprice" and therefore "a form of harassment." *Reyes*, 968 P.2d at 451. In practice, this "arbitrary, capricious, and harassing" standard does not limit the discretion of law enforcement officers. Indeed, so far as we can determine, no California court has ever held that a search of a parolee or probationer was arbitrary, capricious, or harassing.[6] This result is not surprising. So long as the officer states that the motivation for the search is related to the "legitimate law enforcement purpose" of searching for evidence of criminal activity, the search is not arbitrary, capricious, or harassing under California's standard. *See, e.g.*, J.A. 13-14 (rejecting claim that search was arbitrary, capricious or harassing).

Moreover, California's "arbitrary, capricious, and harassing" standard is contrary to this Court's Fourth Amendment jurisprudence. *First*, it would result in another standard of reasonableness under the Fourth Amendment, in addition to the established standards of

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[6] The closest approach to such a holding came in an unpublished decision, *People* v. *Delong*, 2004 WL 902118 (Cal. Ct. App. Apr. 28, 2004), in which the court held that the State had failed to carry its burden of offering some explanation of the purpose for the search. Presumably, the State could have carried its burden simply by stating that the purpose of the search was to look for evidence of a crime.

"probable cause" and "reasonable suspicion." The Court has said: "We do not think that the Fourth Amendment's emphasis upon reasonableness is consistent with the creation of a third verbal standard in addition to 'reasonable suspicion' and probable cause.'" *Montoya de Hernandez*, 473 U.S. at 541 (citation omitted). The Court explained that in "dealing with a constitutional requirement of reasonableness, . . . subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question." *Id.*[7]

Second, California's "arbitrary, capricious, and harassing" standard requires the court to inquire into the officer's subjective purpose and intentions. *See Reyes*, 968 P.2d at 451 (search is "arbitrary and capricious" if "the motivation for the search is unrelated to rehabilitative, reformative, or legitimate law enforcement purposes" or if the search is "motivated by personal animosity toward the parolee" or undertaken by law enforcement officers "at their whim or caprice"). In *Whren* v. *United States*, the Court held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 517 U.S. 806, 813 (1996). In *Knights*, the Court reaffirmed that "we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." 534 U.S. at 122. *See also Horton* v. *California*, 496 U.S. 128, 138 (1990) ("[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind

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[7] The Court has also recognized that a completely unguided "totality of the circumstances" test would also be unsatisfactory. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway* v. *New York*, 442 U.S. 200, 213-14 (1979) (citation omitted).

of the officer."). The Court has recognized a "limited exception" to this principle for "special needs and administrative search cases," but that exception has been limited to "programmatic purposes" rather than "an individual officer's subjective intentions." *Edmond*, 531 U.S. at 45-47. California's standard is thus incompatible with this Court's holding in *Whren*.[8]

Under *Whren*, the sole source of protection for Fourth Amendment rights is the requirement that there be an *objective* basis for searches and seizures. Absent a departure from *Whren* that would allow courts to inquire into individual officers' subjective purposes and intentions, parolees are accorded a limited degree of Fourth Amendment protection by applying the least demanding objective standard of reasonableness that can be readily understood by law enforcement officers: the "reasonable suspicion" standard.

D. Suspicionless, Nonconsensual Parolee Searches By Law Enforcement Officers Are Not Needed To Advance Government Interests.

Because suspicionless, nonconsensual searches of all parolees by all law enforcement officers intrude upon privacy interests to an extreme degree, *see* pp. 16-17, *supra*, such searches are unreasonable unless they are needed, to an even more extreme degree, to promote the government's legitimate interests. *See Knights*, 534 U.S. at 119 (balancing "degree to which [a search] intrudes upon an individual's privacy" against "degree to which it

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[8] In *People* v. *Woods*, the California Supreme Court cited *Whren* for the proposition that a law enforcement officer's subjective intent should be disregarded at least where "the circumstances, viewed objectively, show a possible probation violation that justifies a search of the probationer's house pursuant to a search condition." 981 P.2d at 1026.

is needed for the promotion of legitimate governmental interests.") (marks and citation omitted). "The State has a dual concern with a probationer. On the one hand is the hope that he will successfully complete probation and be integrated back into the community. On the other is the concern, quite justified, that he will be more likely to engage in criminal conduct than an ordinary member of the community." *Id.* at 120-21. Neither of these interests is significantly advanced—and at least one may be significantly undermined—by blanket suspicionless searches.

1. Suspicionless Searches By Law Enforcement Officers Are An Obstacle To Parolees' Reintegration Into The Community.

Suspicionless searches are unlikely to further, and could well undermine, the State's interest in rehabilitating parolees and reintegrating them into the community. California law regards parole as "critical to successful reintegration of the offender into society and to positive citizenship." Cal. Penal Code § 3000. In pursuit of this goal, the State accords parolees an intermediate status between prison and full freedom. A "reasonable suspicion" standard for parolee searches provides a modest degree of protection to parolees' privacy expectations, while a suspicionless search standard essentially equates parolees with prisoners in a cell. Subjecting parolees to "serious intrusion[s]" to privacy that "may inflict great indignity and arouse strong resentment," *Terry*, 392 U.S. at 17, absent any objective reason to believe that the parolee may be engaged in wrongdoing, is unlikely to further the State's goal of reintegrating parolees into society and positive citizenship.

Moreover, reintegration into society is promoted by finding affordable housing arrangements, employment,

and forming attachments to law-abiding citizens. As explained above, *see* p. 16-17 *supra*, a regime of suspicionless parolee searches inevitably intrudes upon the privacy of individuals who share a residence with or otherwise form a close attachment with a parolee. In a suspicionless police search regime, individuals who value their privacy rights have an incentive not to share a home or workplace with a parolee; this in turn isolates parolees and makes it more difficult for them to successfully reintegrate into society. In *People* v. *Sanders*, the California Supreme Court recognized that "[m]any law-abiding citizens might choose not to open their homes to probationers [or parolees] if doing so were to result in the validation of arbitrary police action. If increased numbers of probationers were not welcome in homes with supportive environments, higher recidivism rates and a corresponding decrease in public safety may be expected, both of which would detract from the optimum successful functioning of the probation system." 73 P.3d 496, 498, 508 (Cal. 2003) (quoting *People* v. *Robles*, 3 P.3d 311, 317 (Cal. 2000)) (marks omitted).[9]

2. Blanket Suspicionless Searches By Law Enforcement Officers Do Not Significantly Advance the State's Law Enforcement Interest.

The State also has a legitimate interest in preventing parolees from committing crimes while they are on parole. "The recidivism rate of probationers is significantly higher than the general crime rate." *Knights*, 534 U.S. at 120 (citations omitted). Moreover, "probationers have even more of an incentive to conceal

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[9] The holding of *Sanders*, that officers must know that an adult is on parole or probation at the time of the search, is no answer to this problem.

their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply." *Id.* (citations omitted). Although parolee crime is a serious threat, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose. Rather, in determining whether individualized suspicion is required, [the Court] must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue." *Edmond*, 531 U.S. at 42-43. *See also Ferguson*, 532 U.S. at 86 (same). Here, governments have great flexibility to supervise and search parolees without imposing a suspicionless search regime, and thus there is no basis for to conclude that such searches are needed to advance the State's law enforcement interests.

In at least three respects, current law allows governments significant flexibility to search parolees. *First*, police officers may search parolees and their homes without obtaining a search warrant and without probable cause. *Knights*, 534 U.S. at 121.[10] This rule makes it much easier to search a person on parole than a citizen at large. In particular, the concern that parolees may dispose of evidence more quickly than other criminals who commit crimes, is dispelled by eliminating the warrant requirement.

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[10] Petitioner assumes that the *Knights* rule would apply to parolees.

Second, the reasonable suspicion standard sets a relatively low threshold for parolee searches—the lowest objective standard that is available under this Court's Fourth Amendment decisions. "'[R]easonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Illinois* v. *Wardlow*, 528 U.S. 119, 123 (2000). Reasonable suspicion may be based on less information that is less specific and "less reliable than that required to show probable cause." *Alabama* v. *White*, 496 U.S. 325, 330 (1990). It need not "be based on the officer's personal observation," but may instead rest on "information supplied by another person." *Adams* v. *Williams*, 407 U.S. 143, 147 (1972). In short, only "'some minimal level of objective justification'" is required. *United States* v. *Sokolow*, 490 U.S. 1, 9 (1971) (quoting *INS* v. *Delgado*, 466 U.S. 210, 217 (1984)).

In many cases in which parolees are engaged in criminal activity, trained law enforcement officers will have a minimal level of objective justification for searching them. Indeed, courts routinely hold that parolee or probationer searches are justified by reasonable suspicion. *See, e.g.*, *Knights*, 534 U.S. at 122; *Griffin*, 483 U.S. at 880 & n.8 (upholding search based upon "reasonable grounds"); App. B, *infra* (collecting State court decisions). Moreover, once this relatively undemanding standard is met, it justifies not only a pat-down search for weapons, but a full-scale search of the parolee's person, property, and home. In contrast, situations in which trained law enforcement officers cannot develop even "some minimal level of objective justification" for a search are precisely those situations in which a parolee is least likely to be engaged in criminal activity.

Third, any evidence discovered during a parolee search is admissible at a parole revocation hearing. *Scott*, 524 U.S. at 364 (holding that "application of the

[exclusionary] rule in the criminal trial context already provides significant deterrence of unconstitutional searches" of parolees, so that applying the exclusionary rule to revocation proceedings would provide only "minimal deterrence benefits.").

Apart from these established principles, States are free to explore other options that fall well short of California's extreme suspicionless search regime. For example:

- A State is free to argue that it is reasonable for a court or parole board to impose a suspicionless search condition based on consideration of an individual's particular circumstances. *See Knights*, 534 U.S. at 119 ("The judge who sentenced Knights to probation determined that it was necessary to condition the probation on Knights's acceptance of the search provision.").
- A State may seek to limit the discretion of officers to search parolees by regulation, or by establishing an administrative process for approving parolee searches.
- A State may argue that a suspicionless search of a parolee is reasonable if it is justified by a "special need" unrelated to law enforcement.
- A State may argue that a parolee has knowingly and voluntarily consented to a search.

The Court has not decided whether suspicionless searches are reasonable in any of these circumstances, none of which are presented in this case. As explained above, *see* p. 3, *supra*, California's parole search condition is imposed by statute on all parolees, regardless of their circumstances, and California imposes no limits on the discretion of individual police officers. For the reasons explained in Part II, below, at pp. 32-39, the "special needs" doctrine cannot justify the search in this case,

which was undertaken by a law enforcement officer for law enforcement purposes without the knowledge or approval of Petitioner's parole officer. And for the reasons explained in Part III below, at pp. 39-41, Petitioner did not consent to the search in this case. The point is simply that there is a wide spectrum of options, short of California's blanket suspicionless search regime.

In fact, California's parolee search regime goes well beyond that of most other States and the Federal Government. Indeed, with the possible exception of North Dakota, no State other than California permits police officers to engage in suspicionless, nonconsensual searches of parolees. *See* App. B, *infra* (summarizing state law). Thirty States require that nonconsensual parolee or probationer searches be based upon reasonable suspicion or reasonable grounds.[11] In many of those jurisdictions authority to search parolees based upon reasonable suspicion rather than probable cause is limited to parole officers, or police officers working with parole officers. Two additional States (Florida and Iowa) require that parolee searches be based upon probable cause even when undertaken by a parole officer if the evidence will be used in a criminal trial. West Virginia requires probable cause for parolee searches in all cases. Other States (including Kansas, Nebraska, and South Dakota) have upheld parolee searches based upon reasonable suspicion, without expressly holding that reasonable suspicion is required. Where State courts

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[11] The States requiring reasonable suspicion are: Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia (absent consent), Hawaii, Idaho (absent consent), Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Vermont, Washington, Wisconsin, and Wyoming. *See* App. B, *infra*.

have approved suspicionless searches of parolees or probationers, they have done so on the basis of consent, an individualized determination by a court or parole board that a suspicionless search condition was reasonable, or by limiting the authority to conduct the search to parole or probation officers.[12]

The Federal Government, like most States, prohibits suspicionless searches of parolees.[13] The United States Parole Board's Rules and Procedure Manual provides that a search condition "shall permit searches

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[12] *See, e.g., People* v. *McCullough*, 6 P.3d 774, 781-82 (Colo. 2000) (search must be "in furtherance of the purposes of parole" and "carried out under the authority of a parole officer"); *State* v. *Devore*, 2 P.3d 153, 156-57 (Idaho Ct. App. 2000) (suspicionless searches by parole officers or probation officers are reasonable if probationer or parolee consents to search condition; otherwise they require "reasonable grounds"); *State* v. *Zeta Chi Fraternity*, 696 A.2d 530, 540-41 (N.H. 1997) (trial court determined that a search condition authorizing probation officer to conduct random searches of fraternity convicted of selling alcohol to minors was reasonable in light of the circumstances of the case). In *State* v. *Maurstad*, 647 N.W.2d 688, 697-98 (N.D. 2002), the North Dakota Supreme Court stated, "we need not decide whether a suspicionless search would satisfy the Fourth Amendment," and declined to apply its earlier decision in *State* v. *Smith*, 589 N.W.2d 546 (N.D. 1999) (reasonable suspicion not required for a probation or a parole search). In *Owens* v. *Kelley*, 681 F.2d 1362, 1364 (11th Cir. 1982), the court approved a suspicionless search condition imposed by a Georgia state judge, but warned against using probation searches as "a subterfuge for criminal investigations." The Supreme Court of Georgia subsequently held that, absent consent, a probation search must be based on "reasonable grounds." *Fox* v. *State*, 527 S.E.2d 847, 850 (Ga. 2000).

[13] Although Congress abolished federal parole for crimes committed after November 1, 1987, the U.S. Parole Board retains jurisdiction over parolees convicted of crimes committed before November 1, 1987 as well as parole decisions for the District of Columbia.

only if the Supervision Officer has a reasonable belief that contraband or evidence of a violation of the conditions of release may be found." U.S. Parole Comm'n R. & Proc. Man. § 2.204-18(b)(2).[14] The Commission's "Model Search Condition" provides: "The releasee shall submit his person, residence, office, or vehicle to a search, conducted by a Supervision Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the release shall warn any other residents that the premises may be subject to searches pursuant to this condition." *Id.* § 2.204-18(b)(3).

The Manual provides that in general, "[s]earches by Supervision Officers are disfavored" and "[o]ther techniques should be relied upon to monitor compliance with conditions of supervision." *Id.* § 2.204-18(a). The Commission's rules state that search conditions should not be "routinely" imposed on federal parolees, but instead should be requested "only in those cases in which the Officer determines, based upon the offense of conviction (including the nature and circumstances of the offense behavior) and background of the offender, that resort to such a condition is necessary to enforce the conditions of release or to protect the public." *Id.* § 2.204-18(b)(1). Federal parolee searches "shall be conducted

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[14] The Commission's Manual includes notes and procedures "that clarify and supplement" the Commission's rules, which are codified at 28 C.F.R. §§ 2.1-2.107 and 2.200-2.220. U.S. Parole Comm'n R. & Proc. Man. 8. The rules related to conditions of release specified in 28 C.F.R. § 2.204 and the accompanying guidance in the Manual apply to offenders released after a violation of the District of Columbia Code. 28 C.F.R. § 2.200(a). These provisions also apply to persons released on federal parole. 28 C.F.R. § 2.40(a)(1); U.S. Parole Comm'n R. & Proc. Man. § 2.240-01.

only upon the written approval of an application for such search." *Id.* § 2.204-18(e). The application for a search must be in writing, must be reviewed by the Supervision Officer's supervisor, and must be approved in writing by the Chief Supervision Officer of the district or his designee. In exigent circumstances the application to search "may be presented orally and reduced to writing at the earliest opportunity." *Id.*

There is no evidence that the Federal Government and virtually every State other than California experience higher parolee recidivism rates because they do not authorize blanket suspicionless searches of parolees.[15] The fact that an overwhelming majority of the States do not allow blanket suspicionless searches of parolees demonstrates convincingly that such searches are not needed to advance legitimate government interests.

In *Knights*, the Court held that "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." 534 U.S. at 121. That standard strikes a reasonable balance between the diminished privacy interests of parolees and the government's legitimate interests in rehabilitation and crime prevention. In contrast, a blanket regime of suspicionless, nonconsensual, discretionary searches by

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[15] A recent study by a respected scholar concluded that close supervision "did not decrease subsequent arrests or overall justice system costs," and rejected the hypothesis that "increased surveillance acts as a constraint on the offender." Joan Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?*, 62 Federal Probation 3, 6 (Dec. 1998).

police officers severely impairs privacy rights and is not needed to advance the government's interests. Accordingly, a law enforcement officer's nonconsensual search of a parolee is not reasonable unless it is based upon individualized suspicion.

II. The "Special Needs" Doctrine Does Not Justify The Search In This Case.

The search in this case also cannot be upheld under the "special needs" doctrine. The Court has applied that doctrine to uphold "certain regimes of suspicionless searches where the program was designed to serve 'special needs, beyond the normal need for law enforcement.'" *Edmond*, 531 U.S. at 37 (citation omitted). In *Griffin*, the Court held that the State's "special need" to supervise probationers justified a regulation authorizing probation officers to search probationers' homes in the absence of a search warrant or probable cause, so long as the probation officer had "reasonable grounds" to believe the house contained contraband. 483 U.S. at 876. In subsequent cases, the Court has held that the "special need" that is "advanced as a justification for the absence of a warrant or individualized suspicion" must be "one divorced from the State's general interest in law enforcement." *Ferguson*, 532 U.S. at 79; *see also Edmond*, 531 U.S. at 41. In this case, as in *Knights*, the search was undertaken for a law enforcement purpose by a police officer rather than a parole or probation officer. Accordingly, as in *Knights*, the "special needs" doctrine does not apply.

A. Suspicionless Searches Cannot Be Justified Under The "Special Needs" Doctrine Unless They Are "Divorced From The State's General Interest In Law Enforcement."

In *Edmond*, the Court held that a highway checkpoint program designed to interdict illegal drugs violated the Fourth Amendment because the checkpoint was employed "primarily for the ordinary enterprise of investigating crimes." 531 U.S. at 44. The Court declined to "sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *Id.*; *see also id.* at 54 (2000) (Rehnquist, C.J., dissenting) ("The 'special needs' doctrine, which has been used to uphold certain suspicionless searches performed for reasons *unrelated to law enforcement*, is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing.") (emphasis added).

The Court's opinion in *Edmond* explained that its holding was consistent with the "limited circumstances" in which it has recognized an exception to "the usual rule" that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." 531 U.S. at 37 (citation omitted). *See id.* (citing *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes); *Treasury Employees* v. *Von Raab*, 489 U.S. 656 (1989) (drug tests for U.S. Customs Service employees seeking promotion or transfer to certain positions); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees involved in train accidents). Similarly, the Court has upheld certain administrative searches that serve purposes other than the investigation of crime. *See Edmond*, 531 U.S. at 37 (citing *Camara* v. *Municipal Court*, 387 U.S. 523, 537 (1967) (administrative searches

to ensure compliance with a city housing code and not "aimed at the discovery of evidence of crime"); *New York* v. *Burger*, 482 U.S. 691, 702-04 (1987) (administrative inspection of premises of "closely regulated" business); *Michigan* v. *Tyler*, 436 U.S. 499, 507-09, 511-12 (1978) (administrative inspection of premises to determine cause of fire). And the Court has upheld "brief suspicionless seizures of motorists at a fixed Border Patrol checkpoint . . . designed to intercept illegal aliens" or "a sobriety checkpoint aimed at removing drunk drivers from the road." *Edmond*, 431 U.S. at 37 (citing *Martinez-Fuerte*, 428 U.S. at 561; *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444 (1990). Based on this review of its prior decisions and consideration of Fourth Amendment principles, the Court concluded that "a 'general interest in crime control'" cannot serve as the "justification for a regime of suspicionless stops." *Id.* at 41 (quoting *Delaware* v. *Prouse*, 440 U.S. 648, 659 n.18 (1979)).

The Court reaffirmed the limitations on "special needs" searches in *Ferguson*, holding that the "special needs" doctrine does not justify a diagnostic test performed to obtain evidence of a patient's criminal conduct for law enforcement purposes without the patient's consent. 532 U.S. 67. The Court again reviewed its prior decisions, and again concluded that "[i]n none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes." *Id.* at 83 n.20. The Court held that "[t]he critical difference" between cases that authorized suspicionless drug testing and *Ferguson* is that where suspicionless searches were authorized "the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement." *Id.* at 79. Even though "the ultimate goal of the program" in *Ferguson* "may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate

evidence *for law enforcement purposes*." *Id.* at 82-83. The Court held that this rendered the "special needs" doctrine inapplicable, and the searches unreasonable.[16]

B. The Search In This Case Was Undertaken By A Law Enforcement Officer For A Law Enforcement Purpose.

The State cannot establish that "there was no law enforcement purpose behind the search[]" in this case, or that there was "little, if any, entanglement with law enforcement." *Id.* at 81. The search was undertaken solely by a police officer "to make sure [Petitioner] is still obeying the laws." J.A. 38. Moreover, California law provides (with exceptions not applicable here) that "parole may not be suspended or revoked for commission of a nonviolent drug possession offense." Cal. Pen. Code § 3063.1(a). In lieu of parole revocation, California has mandated "participation in and completion of an

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[16] In *Ferguson* the Court expressly concluded that *Griffin* does not support the proposition that "the special needs doctrine 'is ordinarily employe[d], precisely to enable searches *by law enforcement officials* who, of course, ordinarily have a law enforcement objective." 532 U.S. at 81 n.15. In rejecting that contention, the Court made four points. *First*, this Court's other "special needs" cases have required that "there was no law enforcement purpose behind the searches" and "little, if any, entanglement with law enforcement." *Id.* *Second*, following *Griffin* the Court reserved the question whether "routine use in criminal prosecutions of evidence obtained" through an administrative scheme would invalidate the search program. *Id.*, (quoting *Skinner*, 489 U.S. at 621 n.5). *Third*, the Court's opinion in *Griffin* emphasized that the probation officer who conducted the search, while not "an impartial magistrate," is also not "a police officer who normally conducts searches against the ordinary citizen." *Id.* (quoting *Griffin*, 483 U.S. at 876). And *fourth*, "*Griffin* is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large," *id.* – a factor that that does not justify application of the "special needs" doctrine.

appropriate drug treatment program." *Id.* Had the search of Petitioner been related to the state's need to supervise parolees, Petitioner should have been assigned to such a program. Rather than following the State's own procedure for parolees found to be in possession of drugs, the State charged Petitioner with a new offense.

The Court did not apply "special needs" analysis in *Knights*, applying instead "ordinary Fourth Amendment analysis," balancing "the degree to which [the search] intrudes upon an individual's privacy" against "the degree to which it is needed for the promotion of legitimate governmental interests." 534 U.S. at 119, 122 (marks and citation omitted). The Court's opinion indicates that "special needs" analysis was inappropriate because there was a law enforcement purpose for the search. The Court noted that the Supreme Court of California had upheld the search condition "'whether the purpose of the search is to monitor the probationer or to serve *some other law enforcement purpose.*'" *Id.* at 117 (quoting *People* v. *Woods*, 981 P.2d at 1024 (emphasis added)). The Court therefore framed the issue in *Knights* as "whether the Fourth Amendment limits searches pursuant to this probation condition to those with a 'probationary' purpose," that is, those that are not related to "some other law enforcement purpose." *Id.* Because the search at issue in *Knights was* related to a law enforcement purpose, "special needs" analysis was inappropriate and the Court applied the general Fourth Amendment balancing test. *Id.* at 118-19.

The Court's decision not to apply "special needs" analysis in *Knights* was correct and follows directly from *Ferguson*, *Edmond*, and *Griffin*. As a leading commentator has explained, "the search in *Knights* was by a police officer for the purpose of general criminal investigation . . . and thus could not have passed muster under *Griffin* in light of that case's emphasis upon the probationer-probation officer relationship and also the

Court's firm stand just the previous Term that 'special needs' cases (*Griffin* being one) must involve a purpose other than 'to detect evidence of ordinary criminal wrongdoing.'" 5 LaFave, *Search and Seizure* § 10.10, at 451 (citations omitted). The outcome is the same in this case, and for the same reasons. Here, as in *Knights*, the search condition is not limited to searches conducted by parole officers, nor is it limited to searches conducted for a parole purpose. Here, as in *Knights*, the search was undertaken by a law enforcement officer rather than a parole officer or a probation officer. And here, as in *Knights*, no parole or probation officer requested, approved, or even knew about the search. The purpose the search was "to uncover evidence of ordinary criminal wrongdoing," *Edmond*, 531 U.S. at 41-42 & 48, and the involvement of law enforcement officers in the search was not only "pervasive" but exclusive, *Ferguson*, 532 U.S. at 85.[17]

That is not to say that a state's operation of its parole system does not present "special needs" beyond law enforcement that can justify parolee searches in appropriate cases. In *Griffin*, the Court applied the "special needs" doctrine to uphold a state regulation that authorized probation officers to conduct searches if they had "reasonable grounds" to do so. 483 U.S. at 880 & n.8. The Court concluded that the State's operation of its probation system qualified as a special need that made "the warrant requirement impractical, and justif[ied] replacement of the standard of probable cause by 'reasonable grounds.'" *Id.* at 876. The Court compared

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[17] The Court's decisions in *Ferguson* and *Edmond* distinguish between the immediate and ultimate goals of a search. *See Ferguson*, 532 U.S. at 81-84; *Edmond*, 531 U.S. at 42. In this case, the immediate and ultimate goals of the search were the same: in the police officer's own words, "to make sure [Petitioner is] still obeying the laws." J.A. 14, 38.

Wisconsin's operation of a probation system to "its operation of a school, government office or prison, or its supervision of a regulated industry." *Id.* at 873. The Court concluded that these programs "present[] 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 873-74. In these circumstances, *Griffin* holds that the "special needs" doctrine may be used to justify a search. That doctrine cannot be expanded, however, to encompass suspicionless searches by police officers for law enforcement purposes.

In *Griffin*, the Court noted that a probation officer rather than a police officer conducted the search. *See id.* at 876 ("Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen."). The distinction is significant because police officers, unlike parole officers, are "engaged in the often competitive enterprise of ferreting out crime." *Scott*, 524 U.S. at 368 (quoting *United States* v. *Leon*, 468 U.S. 897, 914 (1984)). *See also T.L.O.*, 469 U.S. at 349 (Powell, J., concurring) (Police "function as adversaries of criminal suspects." They "have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial.").

Parole officers, in contrast, have a "relationship with parolees [that] is more supervisory than adversarial." *Scott*, 524 U.S. at 368. They "are part of the administrative system designed to assist parolees and to offer them guidance." *Morrissey*, 408 U.S. at 478. "The combination [of parole prohibitions and reporting conditions] puts the parole officer into the position in which he can try to guide the parolee into constructive development." *Id.* In contrast to police, the probation officer is "charged with protecting the public interest,

[and] is also supposed to have in mind the welfare of the probationer." *Id.*

In sum, while the "special needs" doctrine may be used to justify some searches of parolees and probationers, it may not be extended to suspicionless searches by law enforcement officers that are "specifically designed to gather evidence of violations of penal laws." *Ferguson*, at 83 n.21. *See also* Brief of ACLU as *Amicus Curiae* at 13-20. Accordingly, this case "simply does not fit within the closely guarded category of 'special needs.'" *Id.* at 84.[18]

III. The "Consent" Rationale Does Not Apply To The Search In This Case.

In *Knights*, this Court considered, but did not decide, whether a search of a California *probationer* "satisfied the Fourth Amendment under the 'consent' rationale of cases such as *Zap* v. *United States*, 328 U.S. 624 (1946), and *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). 534 U.S. at 118. No matter how the probationer search question left open in *Knights* is answered, it is clear that the "consent" rationale does not justify the search of a California *parolee* such as Petitioner. The California Supreme Court held in *People* v. *Reyes*, 968 P.2d 445 (1998), that "[t]he consent exception to the warrant requirement may not be invoked to validate the search of an adult parolee" in California. *Id.* at 448. The Court explained that "under the [California] Determinate

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[18] Even if "special needs" analysis did apply, the Court's "special needs" cases have "employed a balancing test that weighed the intrusion on the individual's interest in privacy against the 'special needs' that supported the program." *Ferguson*, 532 U.S. at 78. For the reasons explained in Part I, *supra*, at pp. 11-32, the benefit to the State of allowing police to conduct suspicionless parolee searches does not outweigh the substantial intrusion on privacy.

Sentencing Act of 1976, parole is not a matter of choice. The Board of Prison Terms must provide a period of parole; the prisoner must accept it. Without choice, there can be no voluntary consent to inclusion of the search condition." *Id.* (citations omitted). *See also* Cal. Code Regs. tit. 15 § 2512(a) ("The parole conditions are not a contract but are the specific rules governing all parolees whether or not the parolee has signed the form containing the parole conditions."); *People* v. *Guzman*, 107 P.3d 860, 867 (Cal. 2005) (parole is "mandatory from the offender's perspective"); J.A. 12 (quoting *People* v. *Lewis*, 74 Cal. App. 4th 662, 668 (Cal. Ct. App. 1999) (Search conditions are "automatic, and imposed on every parolee" in California)). Consequently, "[i]t is a conceptual mistake to consider the imposition of conditions on a parolee in California as a 'waiver' of rights . . . . [T]he consent/waiver doctrine is irrelevant in this context." *United States* v. *Crawford*, 372 F.3d 1048, 1063-64 (2004) (en banc) (Trott, J., concurring).

The California Supreme Court's interpretation of California law is binding on this Court. *See Griffin*, 483 U.S. at 875 (noting that the Wisconsin Supreme Court is "the ultimate authority on issues of Wisconsin law," and therefore this Court is "bound by the state court's interpretation" of state law). The parolee search in this case thus cannot be justified under a "consent" rationale.[19]

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[19] The State did not seek to justify the search in this case under a consent rationale in the courts below or in its brief in opposition to certiorari. In its brief to this Court in *Knights*, California confirmed that "parolees, who may not refuse release, are by law subject to searches without warrant or cause at any time of the day or night by parole or peace officers. Amicus Br. of California in No. 00-1260, at 8 n.3. *See also* Br. for the United States in No. 00-1260, at 17 n.8 ("parolees and juvenile probationers, who are not offered the opportunity to (...continued)

In *People* v. *Bravo*, 738 P.2d 336 (Cal. 1987), the California Supreme Court held that *probationer* searches, unlike parolee searches, can be justified under a "consent" rationale. Although *Knights* leaves open the probationer consent question decided in *Bravo*, this Court has stated that "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U.S. 543, 548-49 (1968). *See also Ferguson*, 532 U.S. at 85 ("knowing waiver" standard). It is doubtful whether a probationer's consent to a blanket search condition is free, voluntary, and knowing. As one leading commentator has said, "to speak of consent in this context is to resort to a manifest fiction, for the probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse." *See* 5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b), at 440-41 (4th ed. 2004) (marks and citations omitted). Moreover, the Court has indicated that a "consent" rationale may not be used to strip probationers of constitutional rights. *See Minnesota* v. *Murphy*, 465 U.S. 420, 435 & n.7 (1984) (indicating that government may not condition release on probation upon the individual's willingness to waive the Fifth Amendment privilege against self-incrimination).

The Court need not reach these additional arguments, however, because the parolee consent issue in this case is resolved by the California Supreme Court's determination that parolees such as Petitioner do not consent to suspicionless searches.

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decline conditional release, cannot be said to have consented to searches conducted without a warrant or probable cause").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 28, 2005

APPENDICES

Appendix A
Constitutional And Statutory Provisions Involved

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The California Penal Code provides, in part:

§ 3000. Release and period of parole

(a)(1) The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the supervision of and surveillance of parolees, including the judicious use of revocation actions, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge. A sentence pursuant to Section 1168 or 1170 shall include a period of parole, unless waived, as provided in this section.

(2) The Legislature finds and declares that it is not the intent of this section to diminish resources allocated to the Department of Corrections for parole functions for which the department is responsible. It is also not the intent of this section to diminish the resources allocated to the Board of Prison Terms to execute its duties with

respect to parole functions for which the board is responsible.

(3) The Legislature finds and declares that diligent effort must be made to ensure that parolees are held accountable for their criminal behavior, including, but not limited to, the satisfaction of restitution fines and orders.

(4) Any finding made pursuant to Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code, that a person is a sexually violent predator shall not toll, discharge, or otherwise affect that person's period of parole.

(b) Notwithstanding any provision to the contrary in Article 3 (commencing with Section 3040) of this chapter, the following shall apply:

(1) At the expiration of a term of imprisonment of one year and one day, or a term of imprisonment imposed pursuant to Section 1170 or at the expiration of a term reduced pursuant to Section 2931 or 2933, if applicable, the inmate shall be released on parole for a period not exceeding three years, except that any inmate sentenced for an offense specified in paragraph (3), (4), (5), (6), (11), (16), or (18) of subdivision (c) of Section 667.5 shall be released on parole for a period not exceeding five years, unless in either case the parole authority for good cause waives parole and discharges the inmate from the custody of the department.

(2) In the case of any inmate sentenced under Section 1168, the period of parole shall not exceed five years in the case of an inmate imprisoned for any offense other than first or second degree murder for which the inmate has received a life sentence, and shall not exceed three years in the case of any other inmate, unless in either case the parole authority for good cause waives parole and discharges the inmate from custody of the department. This subdivision shall also be applicable to inmates who

committed crimes prior to July 1, 1977, to the extent specified in Section 1170.2.

(3) Notwithstanding paragraphs (1) and (2), in the case of any offense for which the inmate has received a life sentence pursuant to Section 667.61 or 667.71, the period of parole shall be five years. Upon the request of the Department of Corrections, and on the grounds that the paroled inmate may pose a substantial danger to public safety, the Board of Prison Terms shall conduct a hearing to determine if the parolee shall be subject to a single additional five-year period of parole. The board shall conduct the hearing pursuant to the procedures and standards governing parole revocation. The request for parole extension shall be made no less than 180 days prior to the expiration of the initial five-year period of parole.

(4) The parole authority shall consider the request of any inmate regarding the length of his or her parole and the conditions thereof.

(5) Upon successful completion of parole, or at the end of the maximum statutory period of parole specified for the inmate under paragraph (1), (2), or (3), as the case may be, whichever is earlier, the inmate shall be discharged from custody. The date of the maximum statutory period of parole under this subdivision and paragraphs (1), (2), and (3) shall be computed from the date of initial parole or from the date of extension of parole pursuant to paragraph (3) and shall be a period chronologically determined. Time during which parole is suspended because the prisoner has absconded or has been returned to custody as a parole violator shall not be credited toward any period of parole unless the prisoner is found not guilty of the parole violation. However, in no case, except as provided in Section 3064, may a prisoner subject to three years on parole be retained under parole supervision or in custody for a period longer than four years from the date of his or her initial parole, and, except

as provided in Section 3064, in no case may a prisoner subject to five years on parole be retained under parole supervision or in custody for a period longer than seven years from the date of his or her initial parole or from the date of extension of parole pursuant to paragraph (3).

(6) The Department of Corrections shall meet with each inmate at least 30 days prior to his or her good time release date and shall provide, under guidelines specified by the parole authority, the conditions of parole and the length of parole up to the maximum period of time provided by law. The inmate has the right to reconsideration of the length of parole and conditions thereof by the parole authority. The Department of Corrections or the Board of Prison Terms may impose as a condition of parole that a prisoner make payments on the prisoner's outstanding restitution fines or orders imposed pursuant to subdivision (a) or (c) of Section 13967 of the Government Code, as operative prior to September 28, 1994, or subdivision (b) or (f) of Section 1202.4.

(7) For purposes of this chapter, the Board of Prison Terms shall be considered the parole authority.

(8) The sole authority to issue warrants for the return to actual custody of any state prisoner released on parole rests with the Board of Prison Terms, except for any escaped state prisoner or any state prisoner released prior to his or her scheduled release date who should be returned to custody, and Section 3060 shall apply.

(9) It is the intent of the Legislature that efforts be made with respect to persons who are subject to subparagraph (C) of paragraph (1) of subdivision (a) of Section 290 who are on parole to engage them in treatment.

§ 3000.1. Life parole for first or second degree murder offense; Discharge; Revocation

(a) In the case of any inmate sentenced under Section 1168 for any offense of first or second degree murder with a maximum term of life imprisonment, the period of parole, if parole is granted, shall be the remainder of the inmate's life.

(b) Notwithstanding any other provision of law, when any person referred to in subdivision (a) has been released on parole from the state prison, and has been on parole continuously for seven years in the case of any person imprisoned for first degree murder, and five years in the case of any person imprisoned for second degree murder, since release from confinement, the board shall, within 30 days, discharge that person from parole, unless the board, for good cause, determines that the person will be retained on parole. The board shall make a written record of its determination and transmit a copy of it to the parolee.

(c) In the event of a retention on parole, the parolee shall be entitled to a review by the board each year thereafter.

(d) There shall be a hearing as provided in Sections 3041.5 and 3041.7 within 12 months of the date of any revocation of parole to consider the release of the inmate on parole, and notwithstanding the provisions of paragraph (2) of subdivision (b) of Section 3041.5, there shall be annual parole consideration hearings thereafter, unless the person is released or otherwise ineligible for parole release. The panel or board shall release the person within one year of the date of the revocation unless it determines that the circumstances and gravity of the parole violation are such that consideration of the public safety requires a more lengthy period of incarceration or unless there is a new prison commitment following a conviction.

(e) The provisions of Section 3042 shall not apply to any hearing held pursuant to this section.

§ 3001. Discharge from parole

(a) Notwithstanding any other provision of law, when any person referred to in paragraph (1) of subdivision (b) of Section 3000 who was not imprisoned for committing a violent felony, as defined in subdivision (c) of Section 667.5, has been released on parole from the state prison, and has been on parole continuously for one year since release from confinement, within 30 days, that person shall be discharged from parole, unless the Department of Corrections recommends to the Board of Prison Terms that the person be retained on parole and the board, for good cause, determines that the person will be retained. Notwithstanding any other provision of law, when any person referred to in paragraph (1) of subdivision (b) of Section 3000 who was imprisoned for committing a violent felony, as defined in subdivision (c) of Section 667.5, has been released on parole from the state prison for a period not exceeding three years and has been on parole continuously for two years since release from confinement, or has been released on parole from the state prison for a period not exceeding five years and has been on parole continuously for three years since release from confinement, the department shall discharge, within 30 days, that person from parole, unless the department recommends to the board that the person be retained on parole and the board, for good cause, determines that the person will be retained. The board shall make a written record of its determination and the department shall transmit a copy thereof to the parolee.

(b) Notwithstanding any other provision of law, when any person referred to in paragraph (2) or (3) of subdivision (b) of Section 3000 has been released on parole from the state prison, and has been on parole continuously for three years since release from confinement or since extension of parole, the board shall discharge, within 30

days, the person from parole, unless the board, for good cause, determines that the person will be retained on parole. The board shall make a written record of its determination and the department shall transmit a copy thereof to the parolee.

(c) In the event of a retention on parole, the parolee shall be entitled to a review by the parole authority each year thereafter until the maximum statutory period of parole has expired.

(d) The amendments to this section made during the 1987-88 Regular Session of the Legislature shall only be applied prospectively and shall not extend the parole period for any person whose eligibility for discharge from parole was fixed as of the effective date of those amendments.

§ 3060.5. Revocation of parole for refusal to sign parole agreement; Length of resulting confinement

Notwithstanding any other provision of law, the parole authority shall revoke the parole of any prisoner who refuses to sign a parole agreement setting forth the general and any special conditions applicable to the parole, refuses to sign any form required by the Department of Justice stating that the duty of the prisoner to register under Section 290 has been explained to the prisoner, unless the duty to register has not been explained to the prisoner, or refuses to provide samples of blood or saliva as required by the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (Chapter 6 (commencing with Section 295) of Title 9 of Part 1), and shall order the prisoner returned to prison. Confinement pursuant to any single revocation of parole under this section shall not, absent a new conviction and commitment to prison under other provisions of law, exceed six months, except as provided in subdivision (c) of Section 3057.

§ 3067. Agreement

(a) Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.

(b) Any inmate who does not comply with the provision of subdivision (a) shall lose worktime credit earned pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 on a day-for-day basis and shall not be released until he or she either complies with the provision of subdivision (a) or has no remaining worktime credit, whichever occurs earlier.

(c) This section shall only apply to an inmate who is eligible for release on parole for an offense committed on or after January 1, 1997.

(d) It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment.

(e) This section does not affect the power of the Director of Corrections to prescribe and amend rules and regulations pursuant to Section 5058.

3. The California Code of Regulations provides, in part:

§ 2511. Notice of Parole

(a) Definition. The notice of parole is a general description of rules and regulations governing parolees.

(b) Notice. The notice of parole shall read as follows:

1. Release. You will be released on parole effective ..... for a period of ..... This parole is subject to the following notice and conditions. Should you violate any conditions of this parole, you are subject to arrest and the board may modify, suspend, or revoke your parole and/or order your

return to custody. You have read or have had read to you these conditions of parole and you fully understand them. Whenever any problems arise or you do not understand what is expected of you, talk to your parole agent.

2. Extradition. You waive extradition to the State of California from any State or Territory of the United States, or from the District of Columbia. You will not contest any effort to return you to the State of California.

3. Psychiatric Returns. If the board determines that you suffer from a mental disorder which substantially impairs your ability to maintain yourself in the community or which makes you a danger to yourself or others, the board may order your placement in a community treatment facility or state prison, if necessary for treatment. The board may revoke your parole and order you returned to prison for psychiatric treatment if the necessary treatment cannot be provided in the community.

4. Search. You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer.

5. Detainer. If another jurisdiction has lodged a detainer against you, you may be released to the custody of that jurisdiction. Should you be released from their custody prior to the expiration of your California parole, or should the detainer not be exercised, you are to immediately contact the nearest Department of Corrections' Parole and Community Services Division Office for instructions concerning reporting to a parole agent.

6. Residence. The establishment and maintenance of a residence upon release from prison is critical to the successful reintegration of a parolee into society and is in the interest of the public.

7. Certificate of Rehabilitation. You have been informed and have received in writing the procedure for obtaining a Certificate of Rehabilitation.

§ 2512. General Conditions of Parole

(a) The parole conditions are not a contract but are the specific rules governing all parolees whether or not the parolee has signed the form containing the parole conditions. A violation of any of these conditions of parole may result in the revocation of parole and the parolee's return to prison. The general conditions of parole shall read as follows:

"(1) Special conditions. Any special condition imposed by the department or the board.

(2) Release, Reporting, Residence and Travel. Unless other arrangements are approved in writing, you will report to your parole agent within 24 hours or the next working day if released on the day before a holiday or weekend. Your residence and any change of residence shall be reported to your parole agent in advance. You will inform your parole agent within 72 hours of any change of employment location, employer or termination of employment.

(3) Parole Agent Instructions. You shall comply with all instructions of your parole agent and will not travel more than 50 miles from your residence without his/her prior approval. You will not be absent from your county of residence for a period of more than 48 hours and not leave the State of California without prior written approval of your parole agent.

(4) Criminal Conduct. You shall not engage in criminal conduct. You shall immediately inform your parole agent if you are arrested for a felony or misdemeanor under federal, state, or county law.

(5) Weapons. You shall not own, use, have access to, or have under your control: (a) any type of firearm or

instrument or device which a reasonable person would believe to be capable of being used as a firearm or any ammunition which could be used in a firearm; (b) any weapon as defined in state or federal statutes or listed in California Penal Code Section 12020 or any instrument or device which a reasonable person would believe to be capable of being used as a weapon; or (c) any knife with a blade longer than two inches, except kitchen knives which must be kept in your residence and knives related to your employment which may be used and carried only in connection with your employment; or (d) a crossbow of any kind.

(6) You shall sign the parole agreement containing the conditions of parole specified in this section and any special conditions imposed as specified in section 2513."

Appendix B
State Parole and Probation Search Conditions

Alabama: *Toney* v. *State*, 572 So. 2d 1308, 1312 (Ala. Crim. App. 1990) (upholding parole search pursuant to regulation requiring "reasonable grounds" for search).

Alaska: *Roman* v. *State*, 570 P.2d 1235, 1244 (Alaska 1977) (parole board may impose condition authorizing parole officer to conduct search without probable cause, where condition has a "reasonable nexus" to parolee's crime); Alaska Stat. § 33.16.150(b)(3) (search condition limited to reasonable searches by parole officer or "peace officer acting under the direction of a parole officer").

Arizona: *State* v. *Webb*, 717 P.2d 462, 467 (Ariz. Ct. App. 1985) (parolee search pursuant to search condition must be based on "reasonable cause").

Arkansas: *Cherry* v. *Arkansas*, 791 S.W.2d 354, 356-57 (Ark. 1990) (upholding parole search condition requiring parole officer to have "reasonable grounds" for search); Ark. Reg. 158.00.001(XV)(10,12) (releasee may be searched by Department officer if "reasonable grounds" or "reasonable suspicion" to believe violation of release conditions).

Colorado: *People* v. *McCullough*, 6 P.3d 774, 781-82 (Colo. 2000) (statute imposing search condition on all parolees does not require "reasonable grounds," but search must be "in furtherance of the purposes of parole" and "carried out under the authority of a parole officer").

Connecticut: *State* v. *Smith*, 540 A.2d 679, 691, 691 n.13 (Conn. 1988) (standard for parolee and probationer searches is "reasonable suspicion"); *State* v. *Whitfield*, 599 A.2d 21, 24 (Conn. App. Ct. 1991) (right to conduct parole search based on mere suspicion extends only to parole officer).

Delaware: *State* v. *Harris*, 734 A.2d 629, 634-35 (Del. Super. Ct. 1998) (administrative regulation ensured "reasonable grounds" for probation search; regulation did not permit search based solely on request from law enforcement officer); *State* v. *Redden*, No. CR.A. IN-03-04-0161, 2003 WL 22853419, at *2 (Del. Super. Ct. Oct. 22, 2003) (regulation requires that parolee search be based on "reasonable grounds").

Florida: *Soca* v. *State*, 673 So. 2d 24, 25 (Fla. 1996) (Florida Constitution requires probable cause for probationer search before evidence may be used in a new trial); *State* v. *Yule*, 905 So. 2d 251, 254-55 (Fla. Dist. Ct. App. 2005) (allowing evidence seized during warrantless probation search supported by reasonable suspicion to be used in the trial of a nonprobationer present in probationer's home).

Georgia: *Fox* v. *State*, 527 S.E.2d 847, 850-51 (Ga. 2000) (absent consent, warrantless search of probationer's home requires "reasonable grounds" or "reasonable suspicion").

Hawaii: *State* v. *Propios*, 897 P.2d 1057, 1060, 1061 n.6, 1063 (Haw. 1994) (parolee and probationer may be subject to warrantless search based on "reasonable suspicion," so long as search is not used "to facilitate a criminal investigation").

Idaho: *State* v. *Devore*, 2 P.3d 153, 156 (Idaho Ct. App. 2000) (absent consent to search, parole officer must have "reasonable grounds").

Illinois: *People* v. *Wilson*, 836 N.E.2d 159, 164-66 (Ill. App. Ct. 2005) (under 730 Ill. Comp. Stat. 5/3-3-7(10), proper standard for search of person on parole or mandatory release is reasonable suspicion).

Indiana: *Fitzgerald* v. *State*, 805 N.E.2d 857, 865 (Ind. Ct. App. 2004) (probation search authorized if reasonable suspicion probation conditions are being violated); Ind. Code § 11-13-3-7(a)(6) (employee assigned to supervise

parolee may search parolee if "reasonable cause" to believe existence of parole violation).

Iowa: *State* v. *Cullison*, 173 N.W.2d 533, 537 (Iowa 1970) (with respect to evidence used in new trial, parolee has the same right against unreasonable searches and seizures as ordinary person).

Kansas: *State* v. *Rhodes*, No. 90827, 2004 WL 1878343, at *3 (Kan Ct. App. Aug. 20, 2004) (search pursuant to probation condition proper where "reasonable suspicion" to believe violation of probation terms).

Kentucky: *Smith* v. *Commonwealth*, No. 2004-CA-002099-MR, 2005 WL 2807188, at *3 (Ky. Ct. App. Oct. 28, 2005) (Department of Corrections regulations and policies authorize parole officer to search based on "reasonable suspicion" that parolee is violating a condition of supervision).

Louisiana: *State* v. *Perry*, 900 So. 2d 313, 318 (La. Ct. App. 2005) (parolee search must be based on reasonable suspicion and cannot be a "subterfuge for criminal investigations"); La. Rev. Stat. § 15:574.4(H)(4)(r) (parole board may require parolee to agree to search by parole officer based on "reasonable suspicion").

Maine: No authority located.

Maryland: *State* v. *Raines*, 857 A.2d 19, 28 (Md. 2004) (*Knights* does not adopt a per se rule requiring individualized suspicion for all searches); Md. Code, Corr. Serv. § 6-109 (before entering dwelling of an individual on parole in a home detention program, the Director of the Division of Parole and Probation must apply for a warrant; judge shall issue warrant if (1) scope of the proposed search is reasonable, and (2) requiring consent would jeopardize the attempt to take custody of the offender).

Massachusetts: *Commonwealth* v. *LaFrance*, 525 N.E.2d 379, 381-82, 382 n.5, 382-83 (Mass. 1988)

(requires reasonable suspicion for probation searches; absent *Griffin*-like regulation, warrant based on reasonable suspicion required; police may not use probation officer as a subterfuge to conduct search of probationer).

Michigan: *People* v. *Harris*, No. 250802, 2004 WL 2601272, at *1 (Mich. Ct. App. Nov. 16, 2004) (regulation requires parole agent to have reasonable cause before searching parolee); Mich. Admin. Code. r. 791.7735(2) (parole agent may search parolee if "reasonable cause to believe that a violation of parole exists," and parole agent files a written report with supervisor setting forth specific reasons for search).

Minnesota: *State* v. *Earnest*, 293 N.W.2d 365, 368 n.2, 369 (Minn. 1980) (upholding warrantless search of probationer based on probable cause; no material difference between probationer and parolee); *In re Welfare of D.M.N.*, No. CX-02-1827, 2003 WL 21060843, at *2-3 (Minn. Ct. App. May 13, 2003) ("minimal standard" for probation search is reasonable suspicion).

Mississippi: *Robinson* v. *State*, 312 So.2d 15, 18 (Miss. 1975) (observing in dicta that authorities "generally hold" that "parole authorities" may subject parolees "to inspection and search as may seem advisable to them").

Missouri: *State* v. *Williams*, 486 S.W.2d 468, 473 (Mo. 1972) (parole officer in daily contact with parolee may conduct search "in the reasonable exercise of the officer's judgment"; upholding search where parole officer had "sufficient information" to arouse suspicion of criminal activity involving drugs).

Montana: *State* v. *Burchett*, 921 P.2d 854, 856 (Mont. 1996) (probation officer may conduct a warrantless search of probationer's residence if officer has "reasonable cause" for search); Mont. Admin. R. 20.7.1101(7) (parolee shall submit to search by parole officer based on "reasonable cause").

Nebraska: *State* v. *Davis*, 577 N.W.2d 763, 772 (Neb. Ct. App. 1998) (upholding search of parolee where parole officer had "reasonable grounds" to suspect parole violations).

Nevada: *Allan* v. *State*, 746 P.2d 138, 140 (Nev. 1987) (parole officer must have "reasonable grounds" to suspect parole violation before conducting warrantless search).

New Hampshire: *State* v. *Zeta Chi Fraternity*, 696 A.2d 530, 540 (N.H. 1997) (particularized suspicion not required where search condition is "reasonably related" to supervision and rehabilitation of probationer; search may not be used as a subterfuge for uncovering evidence of criminal activity); *see also Anderson* v. *Peterson*, No. Civ. 02-315-M, 2003 WL 23100320, at *6 n.10 (D. N.H. Dec. 31, 2003) (stating that New Hampshire Supreme Court in *Zeta Chi* addressed a specific condition of probation, rather than a regulation with general applicability).

New Jersey: *State* v. *Maples*, 788 A.2d 314, 318 (N.J. Super. Ct. App. Div. 2002) (administrative regulation for parole search requiring reasonable suspicion satisfies *Griffin* standard); N.J. Admin. Code tit. 10A, § 72-6.3(a) (parole officer's search of parolee's residence must be based on "reasonable articulable suspicion"; supervisor must provide prior approval of search unless circumstances require immediate action).

New Mexico: *State* v. *Baca*, 90 P.3d 509, 522 (N.M. Ct. App. 2004) (warrantless search of probationer must based on reasonable suspicion).

New York: *People* v. *Huntley*, 43 N.Y.2d 175, 181 (N.Y. 1977) (search by police officer of parolee generally requires probable cause; search by parole officer must be "substantially related" to the performance of parole officer's duty); *People* v. *Daniels*, 752 N.Y.S.2d 218, 223 (N.Y. Sup. Ct. 2002) (upholding parolee search pursuant to regulation requiring parole officer to have an "articulable reason" for conducting search).

North Carolina: *State* v. *Robinson*, 560 S.E.2d 154, 159 (N.C. Ct. App. 2002) (probationer search conducted by law enforcement officer valid if based on reasonable suspicion); N.C. Gen. Stat. § 15A-1374(b)(11) (parolee may be required to "submit at reasonable times to searches of his person by a parole officer for purposes reasonably related to his parole supervision"; parolee not required to consent to search that would otherwise be unlawful).

North Dakota: *State* v. *Maurstad*, 647 N.W.2d 688, 696-99 (N.D. 2002) (court will not apply prior decision in *State* v. *Smith*, 589 N.W.2d 546, 548 (N.D. 1998), holding that reasonable suspicion is not required for probation search; "we need not decide whether a suspicionless search would satisfy the Fourth Amendment"); N.D. Cent. Code § 12.1-32-07(4)(n) (court ordering probation "may impose such conditions as it deems appropriate," including requiring probationer to submit to search by probation officer any time of the day or night, with or without a search warrant).

Ohio: *State* v. *Mattison*, No. 17554, 1999 WL 957648, at *2, 4 (Ohio Ct. App. Sept. 3, 1999) (parolee search pursuant to statute requires "reasonable grounds"); Ohio Rev. Code § 2967.131(B) (authorized field officers, acting within scope of supervisory duties, may search parolee if "reasonable grounds" to believe parolee is violating the law or terms of parole).

Oklahoma: *Ott* v. *State*, 967 P.2d 475, 474-76 (Okla. Crim. App. 1998) (parole officer must have "reasonable grounds" for search).

Oregon: *State* v. *Gulley*, 921 P.2d 396, 400-01 (Or. 1996) (state statute requiring probationer to consent to search based on reasonable grounds applies if search is based on a level of suspicion below probable cause but above reasonable suspicion needed for *Terry* stop).

Pennsylvania: *Commonwealth* v. *Williams*, 692 A.2d 1031, 1036-37 (Pa. 1997) (parole officer has right to

search parolee if (1) search is based on reasonable suspicion, and (2) search is reasonably related to parole officer's duty); *Commonwealth* v. *Altadonna*, 817 A.2d 1145, 1152-53 (Pa. Super. Ct. 2003) (police officers must have probable cause to search parolee's person or property); Pa Stat. tit. 61, § 331.27a(d)(1)(i) (permitting searches by parole officer of parolee based on "reasonable suspicion").

Rhode Island: No authority located.

South Carolina: Carl N. Lundberg & Mark V. Desser, 26 S.C. Jur. Probation, Parole, & Pardon § 7 (State policy prevents parole officers from conducting warrantless searches based only on "reasonable grounds").

South Dakota: *State* v. *Ashley*, 459 N.W.2d 828, 830-31 (S.D. 1990) (upholding search pursuant to condition requiring parolee to submit to search without warrant, "whenever reasonable cause was ascertained by a parole agent"; parole officer may not act as an agent of the police).

Tennessee: *State* v. *Miller*, No. W2001-02045-CCA-R3-CD, 2002 WL 1483197, at *4 (probation conditions must be "reasonably related" to offender's sentence). Tenn. Code § 40-35-303(d)(9) (probation conditions may include those "reasonably related to the purpose of the offender's sentence," and not unduly restrictive of offender's liberty, or incompatible with his freedom of conscience).

Texas: *Ballard* v. *State*, 33 S.W.3d 463, 466 (Tex. App. 2000) (probable cause not necessary for arrest or search of parolees) (citing *Garrett* v. *State*, 791 S.W.2d 137, 140 (Tex. Crim. App. 1990, holding parolee may be arrested where there is "reason to believe" that person has violated parole conditions).

Utah: *State* v. *Velasquez*, 672 P.2d 1254, 1263 (Utah 1983) (parole officer must have "reasonable suspicion" for search); *State ex rel. A.C.C.*, 44 P.3d 708, 712-13, 713 n.5

(Utah 2002) (probation officer may search juvenile probationer without individualized suspicion).

Vermont: *State* v. *Lockwood*, 632 A.2d 655, 663 (Vt. 1993) (probation search must be based on "reasonable grounds").

Virginia: *Anderson* v. *Commonwealth*, 507 S.E.2d 339, 340, 342 (Va. 1998) (defendant voluntarily waived Fourth Amendment right to be free from unreasonable searches from law enforcement for one year in exchange for suspended sentence).

Washington: *State* v. *Massey*, 913 P.2d 424, 425 (Wash. Ct. App. 1996) (search of parolee "is reasonable if an officer has a well-founded suspicion that a violation has occurred").

West Virginia: *Hughes* v. *Gwinn*, 290 S.E.2d 5, 9-10 (W. Va. 1982) (probationer search requires probable cause; probationer's status is a factor in determining whether probable cause exists).

Wisconsin: *State* v. *Martinez*, 542 N.W.2d 215, 219 (Wis. Ct. App. 1995) (warrantless probation search valid if based on "reasonable grounds"); Wis. Admin. Code § DOC 328.21(3)(a) (probationer's residence may be searched if "reasonable grounds" to believe presence of contraband; approval of supervisor necessary absent exigent circumstances).

Wyoming: *Jones v. State*, 41 P.3d 1247, 1258 (Wyo. 2002) (probation condition permitting random searches of defendant, his residence, and vehicle for presence of alcohol or controlled substances permissible where condition is reasonably related to probationer's prior crime, rehabilitation, or future conduct); *Pena* v. *State*, 792 P.2d 1352, 1358 (Wyo. 1990) (parole officer must have reasonable suspicion that parolee has committed a parole violation or crime to conduct search).

Supreme Court, U.S.
FILED
JAN 13 2006
OFFICE OF THE CLERK

No. 04-9728

IN THE SUPREME COURT OF THE UNITED STATES

DONALD CURTIS SAMSON, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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QUESTION PRESENTED

Does the Fourth Amendment permit the suspicionless search of a parolee to determine whether he or she is complying with the conditions of his or her parole?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
1. California's Statutory Parole Scheme	2
2. The Search	3
3. Proceedings In State Court	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. UNDER THE TOTALITY OF THE CIRCUMSTANCES THE CALIFORNIA PAROLE SEARCH CONDITION IS REASONABLE UNDER THE FOURTH AMENDMENT	6
A. The Balance Of Interests	7
B. The Parolee's Interest	7
1. Discretion To Search	10

TABLE OF CONTENTS (continued)

			Page
		2. Circumstances Of The Search	12
	C.	The State's Interest	13
	D.	Efficacy Of The Search Condition	16
	E.	Striking The Balance	20
	F.	Conclusion	21
II.		**THE CALIFORNIA PAROLE SEARCH CONDITION IS JUSTIFIED BY THIS COURT'S "SPECIAL NEEDS" JURISPRUDENCE**	21
	A.	Special Needs	21
		1. Purpose Of Search	24
		2. Use Of Law Enforcement Personnel For A Law Enforcement Purpose	28
	B.	The California Parole Search Condition Satisfies This Court's "Special Needs" Doctrine	30

TABLE OF CONTENTS (continued)

			Page
	1.	The Parolee's Interest	31
	2.	Degree Of Intrusion	31
	3.	The State's Interest	31
	4.	Efficacy Of Search Condition	32
C.		Conclusion	32
III.	**PETITIONER VALIDLY CONSENTED TO THE PAROLE SEARCH CONDITION**		32
A.		A California Inmate May Reject Parole By Refusing The Search Condition	32
B.		This Issue Is Properly Before This Court	33
C.		The Consent Of A Parolee Is Valid	34
D.		Conclusion	37
CONCLUSION			38

TABLE OF AUTHORITIES

Cases	Page
Bell v. Wolfish 441 U.S. 520 (1979)	12
Board of Education v. Earls 536 U.S. 822 (2002)	17, 22, 30
Brady v. United States 397 U.S. 742 (1970)	37
Bumper v. North Carolina 391 U.S. 543 (1968)	35
Chandler v. Miller 520 U.S. 305 (1997)	21
City of Indianapolis v. Edmond 531 U.S. 32 (2000)	11, 12, 21, 23, 24, 26
Colorado v. Bertine 479 U.S. 367 (1987)	11, 18
Commonwealth v. LaFrance 402 Mass. 789, 525 N.E.2d 379 (1988)	19
Commonwealth v. Williams 547 Pa. 577, 692 A.2d 1031 (1997)	19
Corbitt v. New Jersey 439 U.S. 212 (1978)	37

TABLE OF AUTHORITIES (continued)

	Page
Ewing v. California 538 U.S. 11 (2003)	14
Ferguson v. City of Charleston 532 U.S. 67 (2001)	24, 26-28
Florida v. J.L. 529 U.S. 266 (2000)	18
Fox v. State 272 Ga. 163, 527 S.E.2d 847 (2000)	19
Griffin v. Wisconsin 483 U.S. 868 (1987)	13, *passim*
Hudson v. Palmer 468 U.S. 517 (1984)	8, 37
Illinois v. Lafayette 462 U.S. 640 (1983)	18
Illinois v. Lidster 540 U.S. 419 (2004)	22, 25
Illinois v. McArthur 531 U.S. 326 (2001)	7
Illinois v. Rodriguez 497 U.S. 177 (1990)	34

TABLE OF AUTHORITIES (continued)

	Page
Jones v. State 41 P.3d 1247 (Wyo. 2002)	19
Minnesota v. Dickerson 508 U.S. 366 (1993)	20
Morrissey v. Brewer 408 U.S. 471 (1972)	7, 8
National Treasury Employees Union v. Von Raab 489 U.S. 656 (1989)	21, 22, 24
New Jersey v. T.L.O. 469 U.S. 325 (1985)	21, 22
New York v. Burger 482 U.S. 691 (1987)	11, 17, 25, 28
New York v. Hill 528 U.S. 110 (2000)	35
North Carolina v. Alford 400 U.S. 25 (1970)	37
Owens v. Kelley 681 F.2d 1362 (11th Cir. 1982)	19, 21
Pennsylvania Bd. of Probation and Parole v. Scott 524 U.S. 357 (1998)	13, 23, 31

TABLE OF AUTHORITIES (continued)

	Page
People v. Bremmer 30 Cal. App. 3d 1058, 106 Cal. Rptr. 797 (1973)	10
People v. Clower 16 Cal. App. 4th 1737, 21 Cal. Rptr. 2d 38 (1993)	11
People v. Daniels 194 Misc.2d 320, 752 N.Y.S.2d 218 (2002)	19
People v. McCollough 6 P.3d 774 (Colo. 2000)	19, 23
People v. Reyes 19 Cal. 4th 743, 968 P.2d 445 80 Cal. Rptr. 2d 734 (1998)	5, 9, 10, 21, 31, 33
People v. Willis 28 Cal. 4th 22, 46 P.3d 898, 120 Cal. Rptr. 105 (2002)	3, 23, 33
People v. Wilson 361 Ill. App.3d 93, 836 N.E.2d 159 296 Ill. Dec. 744 (2005)	19
People v. Woods 21 Cal. 4th 668, 981 P.2d 1019 88 Cal. Rptr. 2d 88 (1999)	10, 12
Peretz v. United States 501 U.S. 923, 936 (1991)	35

TABLE OF AUTHORITIES (continued)

	Page
Schneckloth v. Bustamonte 412 U.S. 218 (1973)	34-36
Skinner v. Railway Labor Executives' Assn. 489 U.S. 602 (1989)	18, 22, 24
State v. Baca 135 N.M. 490, 90 P.3d 509 (N.M. Ct.App. 2004)	19
State v. Davis 6 Neb. App. 790, 577 N.W. 2d 763 (1998)	19
State v. Lockwood 160 Vt. 547, 632 A.2d 655 (1993)	19
State v. Maples 346 N.J. Super. 408, 788 A.2d 314 (2002)	19
State v. Smith 589 N.W. 2d 546 (N.D. 1999)	19
Texas v. Brown 460 U.S. 730, 736 (1983)	36
Treasury Employees Union v. Von Raab 489 U.S. 656, 665 (1989)	21
United States v. Barnett 415 F.3d 690 (7th Cir. 2005)	37
United States v. Biswell 406 U.S. 311 (1972)	17

TABLE OF AUTHORITIES (continued)

	Page
United States v. Crawford 372 F.3d 1048 (9th Cir. 2004)	7, 9, 10,13, 15, 23
United States v. DiRe 332 U.S. 581, 595 (1948)	30
United States v. Knights 534 U.S. 112 (2001)	6, 7, 10, 11, 15, 26, 31
United States v. Martinez-Fuerte 428 U.S. 543 (1976)	18, 22
United States v. Mezzanatto 513 U.S. 196 (1995)	35
Washington v. Chrisman 455 U.S. 1 (1982)	34
Whren v. United States 517 U.S. 806 (1996)	10, 11, 12
Williams v. State 321 Ark. 344, 902 S.W.2d 767 (1995)	19
Zap v. United States 328 U.S. 624 (1946)	35, 36

Constitutional Provisions

United States Constitution Fourth Amendment	1, *passim*

TABLE OF AUTHORITIES (continued)

	Page
Statutes	
California Code of Regulations, Title 15	
§ 2511	1
§ 2511(b)(4)	9
§ 2512	1, 8
§ 2512(4)	29
§ 2513	9
California Government Code	
§ 9600	9
California Health and Safety Code	
§ 11377(a)	4
California Penal Code	
§ 1168	2
§ 1170	2
§ 2931	2, 17
§ 2933	2, 17
§ 3000	1, 2, 13, 17
§ 3000.1	1, 13
§ 3001	1
§ 3052	2
§ 3053(a)	2, 8
§ 3056	2
§ 3060.5	1, 9, 33
§ 3063.1(a)	30
§ 3067	1, 2, 9, 23, 29, 32, 33
§ 5000	2

TABLE OF AUTHORITIES (continued)

	Page
§ 5075	2
§ 12021	4
United States Code, Title 28	
§ 1257(a)	1
Other Authorities	
California Department of Corrections and Rehabilitation Data Analysis Unit, Parole Counts p. 6, Table 2 (Nov. 2005)	15
English Penal Servitude Act of 1853 (16 & 17 Vict., c. 99, §§ 9-11)	8
Final Comm. Rep. Cal. Assemb. B. No. 2284 1995-96 Reg. Sess. (Aug. 30, 1996)	2, 23
S. Comm. on Crim. Proc., Rep. on Cal. Assemb. B. No. 2284 1995-96 Reg. Sess. at 4 (June 25, 1996)	3, 23
The Parole System 120 U. Pa. L. Rev. 282, 307 (1971)	8

IN THE SUPREME COURT OF THE UNITED STATES

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DONALD CURTIS SAMSON, *Petitioner,*

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STATE OF CALIFORNIA, *Respondent.*

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District, J.A. 9-29, is unreported. The order of the California Supreme Court denying review, J.A. 30, is unreported.

JURISDICTION

The judgment of the California Court of Appeal was entered on October 14, 2004, J.A. 9, and the California Supreme Court denied discretionary review on January 12, 2005, J.A. 30. The petition for writ of certiorari was filed on April 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States, California Penal Code sections 3000, 3000.1, 3001, 3060.5, and 3067, and sections 2511 and 2512 of title 15 of the California Code of Regulations are reprinted in Appendix A of the Brief of Petitioner at pages 1a-11a.

STATEMENT

1. California's Statutory Parole Scheme

In California, convicted felons sentenced to state prison receive either determinate sentence terms or indeterminate sentence terms depending on the nature of the offense. Cal. Penal Code §§ 1168, 1170. All state prison sentences trigger a subsequent period of parole of three years, five years, or, in the case of a life sentence for murder, a term of life on parole. Cal. Penal Code §§ 3000(b)(1)-(3), 3000.1(a). A determinate sentence inmate is eligible for parole when the actual days served plus statutory time credits equal the term imposed by the state trial court. Cal. Penal Code §§ 2931, 2933, 3000(b)(1). Prisoners on parole remain under the legal custody of the Department of Corrections and Rehabilitation. Cal. Penal Code §§ 3056, 5000. Parole ends upon successful completion of parole or at the end of the maximum statutory period of parole, whichever is earlier. Cal. Penal Code § 3000(b)(5). The Board of Parole Hearings establishes and enforces the rules governing state parole release. Cal. Penal Code §§ 3052, 5075. Upon granting parole to any prisoner, the Board of Parole Hearings may also impose on the parolee any conditions that it may deem proper. Cal. Penal Code § 3053(a).

In 1996, the California Legislature enacted Penal Code section 3067, mandating that every prisoner eligible for release on state parole "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Cal. Penal Code § 3067(a).

The stated intent of the legislation resulting in Penal Code section 3067 was that "all parolees be subject to intense supervision and surveillance by law enforcement officers." Final Comm. Rep. Cal. Assemb. B. No. 2284, 1995-96 Reg. Sess. (Aug. 30, 1996). "[T]he Legislature passed section 3067 'to provide for search of parolees by law enforcement officers without cause' and to 'give . . . local law enforcement officers the tools they need to adequately supervise . . . parolees.'"

(*People v. Willis*, 28 Cal. 4th 22, 39, 46 P.3d 898, 909, 120 Cal. Rptr. 2d 105, 118 (2002) quoting S. Comm. on Crim. Proc., Rep. on Cal. Assemb. B. No. 2284 1995-96 Reg. Sess. at 4 (June 25, 1996)) (ellipses original, footnote and emphasis omitted).

2. The Search

At 5:34 p.m. on September 6, 2002, Officer Alex Rohleder of the San Bruno, California, Police Department saw petitioner Donald Curtis Samson walking down the street with a woman and child in the vicinity of Angus Avenue and Mastick Street. J.A. 31-33. Officer Rohleder recognized petitioner from a "prior contact" involving an arrest for an "incident" with his girlfriend. J.A. 32, 35. At that time petitioner said the "police weren't going to take me back to prison." J.A. 43. On the present occasion, "under the impression that he might have a parolee at large warrant," the officer "made contact" with petitioner, "ask[ing] if I could speak with him." J.A. 32. Asked whether he had a parole warrant outstanding, petitioner replied that "[h]e had already taken care of it. And he was released from custody." J.A. 32.[1]

Officer Rohleder radioed his dispatcher and was informed that petitioner was on parole but that the warrant was no longer outstanding. J.A. 33, 36-38, 52. Nevertheless, the officer decided to search petitioner "[b]ecause it's a condition of his parole. I believe that being [a] parolee, that he needs to make sure he's still obeying the laws." J.A. 38. Although Officer Rohleder does not "go after [all parolees] all the time," J.A. 39, he does search them on a "regular basis," J.A. 44. If a "parolee or person [is] subject to [a] search or seizure [condition], I would search them . . . . J.A. 44-45. The officer regarded

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1. Bernard Martinez, petitioner's parole officer, testified that the warrant was issued on June 21, 2002, and that petitioner was taken into custody on June 24 and released on August 28, nine days before his encounter with Officer Rohleder. J.A. 51-52. Petitioner does not challenge the validity of his detention.

interaction with parolees as a matter of "[c]ommunity policing." J.A. 39. He testified that he intended to release petitioner "if he had nothing on him illegal." J.A. 44.

Officer Rohleder's search[2] of petitioner disclosed methamphetamine in a plastic baggie secreted in a cigarette box in his left pocket. J.A. 33.[3]

At the time of the search, petitioner was on parole and subject to a search condition, under which he agreed to be searched "by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause." J.A. 47, 48.

3. Proceedings In State Court

The trial court upheld the search as a valid parole search, which was not arbitrary or capricious. J.A. 62.

Charged with possession of methamphetamine, in violation of California Health & Safety Code § 11377(a), petitioner was found guilty by a San Mateo County jury on March 20, 2003. Reporter's Transcript 233. The trial court found that petitioner had committed four prior felonies, including in 1997 the possession by a felon of a firearm, in violation of California Penal Code section 12021, for which he was on parole at the time of the search. *Id.* at 249-50. Based on the jury's verdict and the court's findings, the court sentenced petitioner to seven years in state prison. J.A. 7.

The California Court of Appeal affirmed petitioner's conviction. Relying on the California Supreme Court decision

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2. At trial Officer Rohleder testified that he had patsearched petitioner for weapons before he had conducted the more thorough search which disclosed the methamphetamine. J.A. 65. Officer Rohleder did not conduct the parole search until his cover officer arrived two to ten minutes later. J.A. 42.

3. Deborah Watson was petitioner's companion at the time of the search. J.A. 53-54. Officer Rohleder testified that she consented to the search of her person. J.A. 42. She disputed that the search was consensual. J.A. 56.

in *People v. Reyes*, 19 Cal. 4th 743, 968 P.2d 445, 80 Cal. Rptr. 2d 734 (1998), the court of appeal rejected petitioner's position that the suspicionless search of a parolee violates the Fourth Amendment. J.A. 12-13. The court of appeal also found that the officer's stated purpose for conducting the search—"to determine whether petitioner, as a parolee, was 'still obeying the laws'"—established that the search was not arbitrary, capricious or conducted for the purpose of harassment, in violation of California law. J.A. 14.

The California Supreme Court denied review. J.A. 30.

SUMMARY OF ARGUMENT

Petitioner's challenge to California's parole search condition must be rejected for the following reasons:

First, as the California Supreme Court has concluded, a parolee has no reasonable expectation of privacy given a parole search condition allowing suspicionless intrusions, which serves a compelling, if not overwhelming, need. Under this Court's totality-of-the-circumstances jurisprudence, the California parole search condition is reasonable under the Fourth Amendment. The parolee's severely diminished expectation of privacy, adequately protected by the state law prohibition against harassing searches, must yield to the overwhelming governmental need to supervise over 100,000 parolees.

Second, this Court's jurisprudence has validated the supervision of probationers and parolees as a "special need" that can justify a suspicionless search. Although a parole search may serve a law enforcement purpose, the programmatic objective is to supervise parolees. Its primary purpose is not to detect evidence of criminal wrongdoing for use in a criminal prosecution. Any evidence may be used for the purpose of an administrative revocation of parole. Authorization of police officers to conduct parole searches does not alter the "special needs" nature of the search.

The discretion of the searching officer is not untrammeled, as petitioner claims. Rather, it is circumscribed by the state law requirement, found in decisional law and statute, that the search

not be arbitrary, capricious or conducted for the purpose of harassment. This circumscription adequately protects a person with the greatly reduced expectation of privacy possessed by a parolee.

Finally, despite petitioner's contention to the contrary, a parolee can reject parole by refusing to agree to the search condition. Petitioner's acceptance of the condition constitutes consent within the meaning of this Court's consent jurisprudence.

ARGUMENT

I.

UNDER THE TOTALITY OF THE CIRCUMSTANCES THE CALIFORNIA PAROLE SEARCH CONDITION IS REASONABLE UNDER THE FOURTH AMENDMENT

Petitioner contends that the California parole search condition authorizing a search in the absence of particularized suspicion violates the Fourth Amendment. He argues: (1) parolees enjoy a reasonable, although diminished, expectation of privacy; (2) that expectation is impermissibly extinguished by the California parole search condition, which confers unfettered discretion on law enforcement officers to conduct searches of parolees; and (3) this search condition does not promote any governmental interests not served by a reasonable suspicion requirement. For the reasons that follow, petitioner's arguments must be rejected. It is now time to decide the question reserved in *United States v. Knights*, 534 U.S. 112 (2001): "whether the probation [or parole] condition so diminished, or completely eliminated, [the probationer's or parolee's] reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." *Id.* at 120 n.6. This question must be answered in respondent's favor.

A. The Balance Of Interests

"[T]he reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *United States v. Knights*, 534 U.S. at 118-19. This Court must then "balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *Illinois v. McArthur*, 531 U.S. 326, 331 (2001). The status as a parolee subject to a search condition "informs both sides of that balance." *United States v. Knights*, 534 U.S. at 119.

B. The Parolee's Interest

At most, a California parolee has a significantly reduced expectation of privacy.[4] In *Morrissey v. Brewer*, 408 U.S. 471 (1972), this Court described the conditions of parole imposed on parolees throughout the Nation:

> These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they

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4. As Judge Trott cogently observed in his concurring opinion in *United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004), a California parolee has no subjective expectation of privacy. *Id.* at 1065. This view is supported by this Court's analysis in *United States v. Knights*, 534 U.S. at 119-20.

must make periodic written reports of their activities. *Id.* at 478.

It is difficult to conceive of a person other than a prison inmate whose reasonable or actual expectation of privacy is less than that of a parolee. *See Hudson v. Palmer*, 468 U.S. 517 (1984). Indeed, although at liberty, in California "[p]risoners on parole shall remain under the legal custody of the [California Department of Corrections and Rehabilitation]." Cal. Penal Code § 3056. This custody status is consistent with the principle that a parolee enjoys "only . . . the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey v. Brewer*, 408 U.S. at 480.

Those restrictions[5] further reduce a California parolee's expectation of privacy. *See* Cal. Penal Code § 3053(a); Cal. Code Regs. tit. 15, § 2510. General conditions of parole require all parolees to do the following: report to the assigned parole agent immediately upon release; inform the agent within 72 hours of any change in employment status, including termination; request permission to travel a distance more than 50 miles from the parolee's residence or to be absent from the county of residence for a period of more than 48 hours; refrain from the commission of criminal conduct; and refrain from the possession of firearms, specified weapons, or knives unrelated to employment. Cal. Code Regs. tit. 15, § 2512.

Special conditions, imposed under appropriate circumstances, include participation in a psychiatric treatment program; abstinence from alcoholic beverages; participation in anti-narcotic testing; residence in an approved location; refraining from participation in a prison gang, disruptive group or criminal street gang, as defined by statute; and "[a]ny other condition

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5. Apparently unknown at common law, parole conditions were first imposed by the English Penal Servitude Act of 1853 (16 & 17 Vict., c. 99, §§ 9-11). Comment, *The Parole System*, 120 U. Pa. L. Rev. 282, 307 (1971). Now parolees in the United States are subject to "numerous, complex, and often stringent conditions . . . ." *Id.*; *see Morrissey v. Brewer*, 408 U.S. at 478.

deemed necessary by the Board [of Parole Hearings] or the Department [of Corrections and Rehabilitation] due to unusual circumstances." Cal. Code Regs. tit. 15, § 2513.

Finally, the parolee's person, his residence, and any property under his control "may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer." Cal. Code Regs. tit. 15, § 2511(b)(4). This search condition is not merely a requirement of the Department of Corrections and Rehabilitation; it is imposed by the People of California, acting through their elected state legislature. California Penal Code section 3067(a) provides: "Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of day or night, with or without a search warrant and with or without cause."[6] Consequently, it is irrefutable that petitioner, like all parolees who accept this condition, "had no subjective expectation of privacy whatsoever." *United States v. Crawford*, 372 F.3d at 1065 (Trott, J., concurring); *see United States v. Knights*, 534 U.S. at 119-20. For this reason alone, the officer's conduct was reasonable within the meaning of the Fourth

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6. The California parole search condition apparently has been the source of some confusion concerning its application to prisoners eligible for parole. Despite some judicial misapprehension to the contrary, *see United States v. Crawford*, 372 F.3d 1048, 1063-64 (9th Cir. 2004) (Trott, J., concurring), a parole-eligible inmate is not obliged to accept the search condition. It is true that, as the concurring opinion in *Crawford* noted, 372 F.3d at 1064, the California Supreme Court declared that a "prisoner must accept" parole. *People v. Reyes*, 19 Cal. 4th at 749, 968 P.2d at 447, 80 Cal. Rptr. 2d at 736 (1998). For reasons stated in Argument III-A, this view is incorrect. Furthermore, section 3067 was not before the court in *Reyes*. Section 3067 was enacted in 1996, 1996 Cal. Stat. 4656-57, and went into effect in 1997, Cal. Gov't Code § 9600. More importantly, failure or refusal by any inmate to agree in writing to the condition results in his continued incarceration. Cal. Penal Code §§ 3060.5, 3067(b). The inmate will not be released until he or she has agreed to all parole conditions. He will remain incarcerated until he signs or until he has served his full sentence plus his statutory period of parole. Cal. Penal Code §§ 3060.5, 3067(b).

Amendment. *See Smith v. Maryland*, 442 U.S. 735, 742-43 (1979).

Petitioner nevertheless contends that his privacy interest, though diminished, is impermissibly infringed in two respects. First, each parole or law enforcement officer "is free to decide, without any objective basis or guidance from a court, parole officer, supervisor, or regulations whether to search a particular parolee." Br. of Petitioner 18. Second, "the officer has equally unfettered discretion to decide where to search, when to search, what to search for, and how hard to look." *Id.* These claims will be addressed in turn.

1. Discretion To Search

California law provides that a search of a parolee or probationer may not be arbitrary, capricious, or conducted for the purpose of harassment. *See People v. Reyes*, 19 Cal. 4th at 753-54, 968 P.2d at 451, 80 Cal. Rptr. 2d at 740 (parole); *People v. Bravo*, 43 Cal.3d 600, 610-11, 738 P.2d 336, 342, 238 Cal. Rptr. 282, 288-89 (probation). Because state decisional law views a parole search on "whim or caprice" as a form of harassment, *People v. Reyes*, 19 Cal. 4th at 754, 968 P.2d at 451, 80 Cal. Rptr. 2d at 740; *People v. Bremmer*, 30 Cal. App. 3d 1058, 1062, 106 Cal. Rptr. 797 (1973), it is readily apparent that that harassment is now, and always has been, forbidden.[7]

For example, state law protects a parolee from searches that are needlessly repetitive, made at an unreasonable hour, conducted in a humiliating manner, or under other oppressive circumstances. *People v. Clower*, 16 Cal. App. 4th 1737, 1741, 21 Cal. Rptr. 2d 38 (1993). If the circumstances, viewed in

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7. Indeed, in *People v. Woods*, 21 Cal. 4th 668, 981 P.2d 1019, 88 Cal. Rptr. 2d 88 (1999), in which the California Supreme Court held that, under *Whren v. United States*, 517 U.S. 806 (1996), the validity of a probation search is determined by the objective circumstances of the search, not the officer's subjective motivations, the court specifically excepted the circumstance of harassment. 21 Cal. 4th at 682, 981 P.2d at 1028, 88 Cal. Rptr. 2d at 98.

their totality, reflect the search was for the purpose of harassment, the search cannot be justified by the parole search doctrine.

This point deserves amplification. The prohibition against searches conducted solely for the purpose of harassment is not merely a matter of state law; it directly implicates the Fourth Amendment. Thus, a search conducted solely to harass serves no legitimate state interest and, as such, is per se unreasonable under the totality of circumstances test. This proposition is well supported by this Court's jurisprudence. For example, an automobile inventory search is not truly such a search and, consequently, is unconstitutional if the officer "acted in bad faith or for the sole purpose of [criminal] investigation." *Colorado v. Bertine*, 479 U.S. 367, 372 (1987); *see also New York v. Burger*, 482 U.S. 691, 716-17 n.27 (1987).

Petitioner argues that *Whren v. United States*, 517 U.S. 806 forbids such an inquiry into the officer's subjective intent. He is incorrect for the following reasons. First, state law specifically forbids a parole search made for the sole purpose of harassment. Consequently, a state trial court must determine this issue. That was not true in *Whren*.

Second, as this Court noted in *Whren*, 517 U.S. at 811-12, and reiterated in *United States v. Knights*, 534 U.S. at 122, the prohibition of inquiry into the subjective motivations of the searching officer does not apply to searches conducted in the absence of probable cause. *Whren* explained the exemption in these cases "from the need for probable cause (and warrant), is not accorded to searches that are *not* made for [the stated] purposes." 517 U.S. at 811-12.

Relying on dictum in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), petitioner argues that the exception recognized in *Whren* applies only to evidence of the "programmatic" purpose of the "special needs" search, not to the subjective motivation of the searching officer. Br. of Petitioner 22; (citing *City of Indianapolis v. Edmond*, 531 U.S. at 45-48). Petitioner's reliance is misplaced. The programmatic purpose of the California parole search scheme is that all parolees be

subject to suspicionless searches and seizures with the restriction that they may not be conducted for the improper purpose of harassment.[8]

2. Circumstances Of The Search

For the reasons advanced in section B-1, *ante*, petitioner is incorrect that an officer's discretion in the conduct of the search is unfettered. The California Supreme Court has consistently insisted that a parole (or probation) "search [may not] be undertaken in a harassing or unreasonable manner." *People v. Woods*, 21 Cal. 4th at 682, 981 P.2d at 1028, 88 Cal. Rptr. 2d at 98. This insistence derives from this Court's principle "that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio*, 392 U.S. 1, 18 (1968). To determine the reasonableness of a search, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

Thus, a search solely for the purpose of harassing the parolee may not be justified by the parole search doctrine. Evidence of such a purpose might include an excessive number of searches of the parolee, or a search that is prolonged, intrusive, or degrading in the absence of any justifying circumstances. In the absence of such evidence of harassment, or of an admission by the officer that his search was solely for the purpose of harassing the parolee, the search is justified by the parolee's status.

For purposes of justifying the scope and circumstances of the search, that status should be the functional equivalent of a custodial arrest, the triggering circumstance and justification for a search incident to arrest. *See United States v. Robinson*, 414 U.S. 218, 235 (1973).

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8. The state court of appeal specifically found that Officer Rohleder did not conduct the search for the purpose of harassment. JA 13-14.

In this case, petitioner did not challenge the scope or intensity of the search in state court. He apparently was quickly searched. It is true that the search was conducted in public, but the same is true of most *Terry* searches and searches incident to an arrest in public. Petitioner cannot validly claim that the scope or intensity of the search was unreasonable in relation to the purpose of the search.

C. The State's Interest

The California Legislature has determined that the "supervision and surveillance of parolees" is necessary to promote "the interest of public safety for the state . . . ." Cal. Penal Code § 3000(a)(1). This Court has concluded that the state interest in the successful management of the parole system to ensure compliance with parole conditions is "overwhelming." *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998). This Court has approved "close parole supervision" because "parolees are more likely to commit future criminal offenses than are average citizens." *Id.* at 365; *see Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987).

Recent statistical compilations document the validity of the Court's observation. The concurring opinion of Judge Trott in *United States v. Crawford*, 372 F.3d 1048, summarized the relevant data:

> According to the authoritative California Journal, as of August 2000, California had 158,177 inmates in its prisons. Jeremy Travis and Sarah Lawrence, *California's Parole Experiment*, Cal. J. (Aug. 2002). Of that population, 126,117 inmates were released on parole during that year. *Id.* Sadly, of that figure, 90,000 were returned to prison, either following a conviction of a new crime or for violating parole conditions. The California Criminal Justice Statistics Center's report prepared in April 2001 indicates that 68% of adult parolees are returned to prison: 55% for a parole violation and 13% for the commission of a new felony offense. California Attorney General, *Crime in California*, April, 2001, at 37.

> According to the California Policy Research Center, "70% of the state's paroled felons reoffend within 18 months–the highest recidivism rate in the nation." Joan Petersilia, *Challenges of Prisoner Reentry and Parole in California,* 12 CPRC (June 2000).

372 F.3d at 1069 (footnote omitted).

In *Ewing v. California*, 538 U.S. 11 (2003), this Court discussed the nature and extent of the problem posed by recidivism in California and throughout the Nation:

> Recidivism is a serious public safety concern in California and throughout the Nation. According to a recent report, approximately 67 percent of former inmates released from state prisons were charged with at least one "serious" new crime within three years of their release. *See* U.S. Dept of Justice, Bureau of Justice Statistics, P. Langan & D. Levin, Special Report: Recidivism of Prisoners Released in 1994, p. 1 (June 2002). In particular, released property offenders like Ewing had higher recidivism rates than those released after committing violent, drug, or public-order offenses. *Id.*, at 8. Approximately 73 percent of the property offenders released in 1994 were arrested again within three years, compared to approximately 61 percent of the violent offenders, 62 percent of the public-order offenders, and 66 percent of the drug offenders. *Ibid.*
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> In 1996, when the Sacramento Bee studied 233 three strikes offenders in California, it found that they had an aggregate of 1,165 prior felony convictions, an average of 5 apiece. See Furillo, Three Strikes–The Verdict: Most Offenders Have Long Criminal Histories, Sacramento Bee, Mar. 31, 1996, p. A1. The prior convictions included 322 robberies and 262 burglaries. *Ibid.* About 84 percent of the 233 three strikes offenders had been convicted of at least one violent crime. *Ibid.* In all, they were responsible for 17 homicides, 7 attempted slayings, and 91 sexual assaults and child molestations. *Ibid.* The Sacramento Bee concluded, based on its investigation, that "[i]n the

vast majority of the cases, regardless of the third strike, the [three strikes] law is snaring [the] long-term habitual offenders with multiple felony convictions . . . ." *Ibid.* 538 U.S. at 26.

The difficulty attending the supervision of parolees is exacerbated by their penchant for secrecy. "And [parolees] have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because [parolees] are aware that they may be subject to supervision and face revocation of [parole,] and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply . . . ." *United States v. Knights*, 534 U.S. at 120 (citations omitted).

Furthermore, although probationers and parolees are often regarded as comparable in terms of the need for supervision, they are, in fact, quite different. "[A]s distinguished from those not convicted of anything, those convicted of mere misdemeanors and either jailed or not jailed, and those convicted of felonies but not imprisoned for lengthy periods, parolees are persons deemed to have acted more harmfully than anyone else except those felons not released on parole." *United States v. Crawford,* 372 F.3d at 1077 (Kleinfeld, J., concurring).

As of November 30, 2005, California had over 130,000 released parolees, a figure which includes more than 20,000 absconded parolees. California Department of Corrections and Rehabilitation, Data Analysis Unit, Parole Counts, p. 6, Table 2 (Nov. 2005.)[9/] California's population of parolees is comparable to the population of Alexandria, Virginia. Such a city presents a problem of unprecedented magnitude.

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9. By contrast, in 2004, federal supervised releases totaled 86,567 throughout the Nation. U.S. Department of Justice, Bureau of Justice Statistics, Probation and Parole in the United States, 2004, p. 7, Table 4 (Nov. 2005).

D.Efficacy Of The Search Condition

Petitioner contends that the California parole search condition does not serve the State's interest in the supervision of its parolees. He argues that it interferes with the reintegration of parolees into society and that a requirement of reasonable suspicion to justify a search, adopted by a majority of other States, adequately serves California's supervisory need. Petitioner's submission is untenable.

To support his claim that the California parole search condition frustrates the reintegration of parolees into society, petitioner argues that equation of a parolee with a prisoner in a cell "is unlikely" to promote the stated objective of reintegration. Petitioner offers no evidence to support his assertion. Furthermore, as explained *post*, he overlooks the deterrent value of a suspicionless search, which will promote obedience to the law and positive citizenship.

Petitioner also speculates that the California parole search condition will discourage "law abiding citizens" from living with parolees, fearing that their living quarters would be subject to suspicionless searches. The Fourth Amendment simply was not intended to address the social concerns petitioner wishes to raise.

Petitioner next claims that the California parole search condition does not significantly advance the state interest in the supervision of parolees. Acting through its Legislature, California has concluded that the search condition does promote significant state interests. For reasons which follow, this conclusion is rational.

First, a determinate sentence prison inmate is entitled to parole when the actual days he or she served plus statutory time credits equal the term imposed by the state trial court. Cal. Penal Code §§ 2931, 2933, 3000(b)(1). Consequently, inmates may be released early regardless of their capacities to reintegrate themselves into society or the threat they pose to the communities to which they return. Many parolees, perhaps most of them, require intense supervision.

Second, this Court has recognized that "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *United States v. Biswell*, 406 U.S. 311, 316 (1972); *accord New York v. Burger*, 482 U.S. at 710. Of course, under a regime of reasonable suspicion, searches can be only as frequent as the discovery of the requisite quantum of suspicion permits. The requirement of individualized suspicion, as the California Legislature concluded, would frustrate the need for effective supervision of parolees. Careful concealment of illegal activities—as petitioner did in this case—would allow these activities to go "undetected and uncorrected." *Griffin v. Wisconsin*, 483 U.S. at 878.

Third, this Court observed in *Griffin* "that more aggressive supervision can reduce recidivism, . . . and the importance of supervision has grown as probation has become an increasingly common sentence for those convicted of serious crimes." *Id.* at 875 (citation omitted). These concerns apply a fortiori to parolees.

The centerpiece of petitioner's challenge to the California parole search condition is his argument that a requirement of reasonable suspicion would serve the State's interest in the supervision of parolees equally effectively while intruding less into the privacy rights of parolees. This Court has consistently refused to hold that the reasonableness of a practice under the Fourth Amendment requires the absence of a less intrusive means to the same end. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 837 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989); *Colorado v. Bertine*, 479 U.S. at 373-74; *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976). Additionally, and dispositively, a requirement of reasonable suspicion would not be as effective as a suspicionless search in the supervision of parolees.

Although petitioner characterizes the quantum of reasonable suspicion as a "relatively undemanding standard," Br. of

Petitioner 26, he ignores the principle that the uncorroborated tip of an anonymous informant does not amount to reasonable suspicion. *Florida v. J.L.*, 529 U.S. 266, 271 (2000). Thus, a parole agent or other peace officer, receiving an anonymous tip of wrongdoing by a parolee, would be powerless to investigate by the simple expedient of a search. Efforts to seek corroboration would consume time during which the parolee could secrete or dispose of his incriminating evidence. Supervision of parolees' activities on the street would be greatly hampered under a reasonable suspicion regime.

Furthermore, petitioner's submission is inconsistent with *Griffin*, in which this Court upheld the search of a probationer's home based on the unverified tip supplied to a peace officer. Under *Florida v. J.L.*, that information did not rise to the level of reasonable suspicion. As petitioner notes in his Brief, at 21, there is no quantum of suspicion below reasonable suspicion. *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985). Consequently, acceptance of petitioner's argument would require a redefinition of reasonable suspicion in the context of the search of a probationer or parolee. As this Court pointed out, the creation of an additional level of reasonableness "may obscure rather than elucidate" the meaning of that term. *Id.*

Finally, surveying the law governing parole searches in other States, petitioner notes that a majority requires reasonable suspicion to justify a parole search. He concludes that these states have found suspicionless searches to be unnecessary. The logic of this reasoning is not immediately apparent. First, many courts based their requirement of reasonable suspicion on their construction of the Fourth Amendment or of state law.[10] Their

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10. *E.g.*, *Williams v. State*, 321 Ark. 344, 902 S.W.2d 767 (1995); *Fox v. State*, 272 Ga. 163, 527 S.E.2d 847 (2000); *People v. Wilson*, 361 Ill. App.3d 93, 836 N.E.2d 159, 296 Ill. Dec. 744 (2005); *Commonwealth v. LaFrance*, 402 Mass. 789, 525 N.E.2d 379 (1988); *State v. Maples*, 346 N.J. Super. 408, 788 A.2d 314 (2002); *State v. Baca*, 135 N.M. 490, 90 P.3d 509 (N.M. Ct.App. 2004); *People v. Daniels*, 194 Misc.2d 320, 752 N.Y.S.2d

perception of constitutional law, not social policy, dictated the result in these cases. Second, and more fundamentally, petitioner has not shown that the States on whose decisions he relies have a parolee population or supervision problem which is remotely comparable to that of California. Each State must be permitted to address and resolve its social issues in its own fashion, with due regard for the constitutional rights of those affected. This resolution of these problems should not be encased in constitutional concrete, applicable to all other States by reason of their numerical plurality.[11/]

E. Striking The Balance

This balance of competing interests—the parolee's greatly diminished expectation of privacy and the State's need to supervise a person who was, and likely remains, a threat to society—justifies California's rule permitting suspicionless searches of parolees' persons and effects. A requirement of reasonable suspicion urged by petitioner would strike an inappropriate balance of the competing interests.

Nonconsensual street encounters between police and citizens are generally governed by the reasonable suspicion standard

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218 (N.Y. Sup. Ct. 2002); *Commonwealth v. Williams*, 547 Pa. 577, 692 A.2d 1031 (1997); *State v. Lockwood*, 160 Vt. 547, 632 A.2d 655 (1993); *Jones v. State*, 41 P.3d 1247 (Wyo. 2002).

11. Several courts have approved suspicionless parole and probation searches pursuant to a valid search condition. *E.g.*, *Owens v. Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982); *People v. McCollough*, 6 P.3d 774 (Colo. 2000); *State v. Smith*, 589 N.W. 2d 546 (N.D. 1999); *State v. Davis*, 6 Neb. App. 790, 803-05, 577 N.W. 2d 763, 772 (1998).

Petitioner asserts that all decisions of other jurisdictions upholding suspicionless searches are distinguishable because they are based either on consent, an individualized determination that a suspicionless search condition was reasonable, or a requirement that the search be conducted by a parole or probation officer. These distinctions are meaningless in light of the substantial protections provided by California to parolees and probationers: the search must not be arbitrary, capricious or conducted for the purpose of harassment; and it must be reasonable in execution.

announced in *Terry v. Ohio*, 392 U.S. 1. Thus, reasonable suspicion that a person is about to commit a crime justifies his detention; reasonable suspicion that he has a weapon justifies his search. Under petitioner's view of the law, a parolee would receive virtually as much protection from the Fourth Amendment as a citizen who was not on parole. The only difference would be the circumstance in which the officer had reasonable suspicion to believe that the person under investigation possessed incriminating evidence other than a weapon. In that situation, the nonparolee could not be searched, *Minnesota v. Dickerson*, 508 U.S. 366 (1993), but, petitioner submits, the parolee properly could be searched. Such a *de minimis* difference is wholly inadequate to serve the compelling state interest in the supervision of parolees.

As the Court has noted in discussing the compelling state need for effective probation supervision, the goals of rehabilitation and protection of the community (both of which are typically identified as the objectives of probation and parole) "require and justify the exercise of supervision to assure that the [probation or parole] restrictions are in fact observed. Recent research suggests that more intensive supervision can reduce recidivism . . . ." *Griffin v. Wisconsin*, 483 U.S. at 875. By contrast, petitioner's position would result in less, not more, supervision. The prohibition of searching based on an uncorroborated tip is only one example. Thus, the requirement of reasonable suspicion would "completely undermine the purpose of the search condition." *Owens v. Kelley*, 681 F.2d at 1368.

F. Conclusion

This balance of competing interests confirms the wisdom of *People v. Reyes*, 19 Cal. 4th at 753, 968 P.2d at 451, 80 Cal. Rptr. 2d at 740:

> The level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored. Moreover, the purpose of the search condition

is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches. We thus conclude a parole search may be reasonable despite the absence of particularized suspicion.

II.

THE CALIFORNIA PAROLE SEARCH CONDITION IS JUSTIFIED BY THIS COURT'S "SPECIAL NEEDS" JURISPRUDENCE

If this Court should conclude that the totality of circumstances analysis is inapplicable to the California parole search condition, respondent submits that it is justified by this Court's "special needs" jurisprudence.

A. Special Needs

It is generally true that the Fourth Amendment requires at least reasonable suspicion of criminal activity within the meaning of *Terry v. Ohio*, 392 U.S. 1, to justify a search by a state agent, *City of Indianapolis v. Edmond*, 531 U.S. at 37; *Chandler v. Miller*, 520 U.S. 305, 308 (1997). However, individualized suspicion "is [not] an indispensable component of reasonableness in every circumstance." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985). "[T]he Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. at 561.

One species of search which this Court has found to be valid without a showing of individualized suspicion is denominated "special needs." *See Illinois v. Lidster*, 540 U.S. 419 (2004); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646; *Von Raab*, 489 U.S. 656; *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602; *Griffin v. Wisconsin*, 483 U.S. 868. First identified in Justice Blackmun's concurring opinion in *T.L.O.*, the "special needs" doctrine refers to those "'needs, beyond the normal need for law

enforcement, [that] make the warrant and probable-cause requirement impracticable.'" *Griffin v. Wisconsin*, 483 U.S. at 873 (quoting *New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun J., concurring)).

In *Griffin*, this Court held that a state's operation of a probation system "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." 483 U.S. at 873-74. The Court explained:

> [P]robation, like incarceration, is "a form of criminal sanction imposed by a court upon an offender after verdict, finding, or a plea of guilty".... [P]robationers (as we have said it to be true of parolees)... do not enjoy "the absolute liberty to which every citizen is entitled, but only ... conditional liberty properly dependent on observance of special [probation] restrictions." [¶] These restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. These same goals require and justify that the restrictions are in fact observed.

Id. at 874-75 (citations omitted and last ellipsis and third brackets original).

Although *Griffin* involved probation, its reasoning and concerns apply "with equal, if not greater, force, to the parole system." *People v. McCullough*, 6 P.3d at 779 n.10. Because parolees "are more likely to commit future criminal offenses than are average citizens," *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. at 365, this Court recognizes that a State can "accord[] a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release. In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements. The State thus has an 'overwhelming interest' in ensuring that a parolee complies with those requirements and is returned to prison if he fails to do so." *Id.* Given that "parole may be an even more severe

restriction on liberty because the parolee has already been adjudged in need of incarceration[,] . . . the 'special needs' of probation discussed in *Griffin* would appear to be heightened for parole." *People v. McCullough*, 6 P.3d at 779 n.10; *accord United States v. Crawford*, 372 F.3d at 1077 (Trott, J., concurring).

This Court has cautioned that the "special needs" dispensation of individualized suspicion does not apply to a program whose primary purpose is to detect evidence of "ordinary criminal wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. at 38. Consequently, this Court may inquire into the purpose of such a program or scheme. *Id.* at 45-46. As the California Supreme Court found, "the Legislature passed [Penal Code] section 3067 [which permits suspicionless searches] 'to provide for search of parolees by law enforcement officers without cause' and to 'give . . . local law enforcement officers the tools they need to adequately supervise . . . parolees.'" *People v. Willis*, 28 Cal. 4th 22, 39, 46 P.3d 898, 909, 120 Cal. Rptr. 2d 105, 118 (2002) (quoting S. Comm. on Crim. Proc., Rep. on Cal. Assemb. B. No. 2284, 1995-96 Reg. Sess. at 4 (June 25, 1996)) (ellipses original, footnote and emphasis omitted). The intent of the legislation was that "all parolees be subject to intense supervision and surveillance by law enforcement officers." Final Comm. Rep. Cal. Assemb. B. No. 2284, 1995-96 Reg. Sess. (Aug. 30, 1996). California's parole search condition therefore falls squarely within the parameters of this Court's "special needs" search jurisprudence. *Griffin v. Wisconsin*, 483 U.S. at 873-74.

Petitioner challenges this conclusion, advancing the following arguments in support of his position. First, he submits, a "special needs" search must be for a purpose completely "divorced from the State's general interest in law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001). Second, he asserts, the search was "undertaken by a law enforcement officer for a law enforcement purpose." Br. of Petitioner 35. Both aspects of this argument are fallacious.

1. Purpose Of Search

Relying on decisions in which the subject of the "special needs" search was not criminally prosecuted, *e.g. Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656; *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, petitioner contends the "special needs" doctrine cannot justify a search unless its purpose is "divorced" from the State's general interest in law enforcement. Petitioner proposes too broad a gauge by which to measure relevant Fourth Amendment interests.

To begin with, petitioner's test is unsupported by precedent. The relevant test is stated in *City of Indianapolis v. Edmond*, which held that the "special needs" doctrine could not justify a "program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." 531 U.S. at 38. By contrast, the purpose of a parole search is primarily to uncover evidence which reveals whether the parolee is complying with, or violating, the conditions of parole. Not all such evidence constitutes proof of criminal activity. For example, a parolee who had been convicted of sex crimes against children may be forbidden from possessing any pornography. Parole supervision may be considered a "law enforcement" objective, but not every such objective is synonymous with the "general interest in crime control" which this Court's jurisprudence excludes as a special need. *See Illinois v. Lidster*, 540 U.S. at 424.

Second, it is true that many parolees violate the conditions of their parole by the commission of a criminal offense, but that circumstance does not invalidate parole supervision as a special need. In *New York v. Burger*, 482 U.S. 691, in upholding a warrantless inspection of an automobile junk yard authorized by a statute covering vehicle dismantlers, this Court rejected the New York Court of Appeals' conclusion that the statute lacked a truly administrative purpose as it was "'designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property.'"

482 U.S. at 712. This Court explained:

> In arriving at this conclusion, the Court of Appeals failed to recognize that a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions. Administrative statutes and penal laws may have the same *ultimate* purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem. An administrative statute establishes how a particular business in a "closely regulated" industry should be operated, setting forth rules to guide an operator's conduct of the business and allowing government officials to ensure that those rules are followed. Such a regulatory approach contrasts with that of the penal laws, a major emphasis of which is the punishment of individuals for specific acts of behavior.

Burger, 482 U.S. at 712-13.

Although *Burger* involved a "closely regulated" industry rather than a "special need," its reasoning applies with equal force to this case.[12/] Parole violation can be addressed either administratively, through the revocation of parole, or by the use of the criminal process. At the time of the search the parole agent or law enforcement officer cannot be certain about the nature of the ultimate discovery. That it may be evidence of criminal activity and result in a criminal prosecution does not minimize the importance of the search to promote adherence to parole conditions and, concomitantly, to deter violations of those conditions.

Furthermore, the commission of a criminal offense necessarily violates the conditions of parole. It would be

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12. Indeed, it is difficult to conceive of conduct more closely regulated than a parolee's.

illogical to apply the "special needs" doctrine only to those searches directed at violations of parole *other* than criminal offenses. Although upholding a probation search under the test of totality of the circumstances, this Court in *Knights* was undisputably (and unanimously) correct in holding that "the Fourth Amendment does not put the State to . . . a choice" between searching for evidence of crime and investigating a parole or probation violation. 534 U.S. at 121. A probation (or parole) search unavoidably requires the search for criminal evidence as a necessary part of the supervisory function.

Third, petitioner's reliance on *Ferguson v. City of Charleston*, 532 U.S. 67, is unavailing. In *Ferguson*, this Court disapproved of a combined hospital, police, and public policy to test pregnant patients for evidence of drug use and to submit evidence of positive use to the police for prosecution. This Court found that the policy "'is ultimately indistinguishable from the general interest in crime control.'" *Id.* at 81 (quoting *Indianapolis v. Edmond*, 531 U.S. at 44). Although the ultimate objective of the program was "to get the women into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal." *Ferguson*, 532 U.S. at 82-83 (emphasis omitted).

To the extent that this Court found the program was primarily motivated by an intent to find evidence of criminal wrongdoing for criminal prosecution, *Ferguson* is consistent with, and supported by, *Edmond*. Consequently, the observation that "a special need" must be "divorced from the State's general interest in law enforcement," 532 U.S. at 79, is dictum which was wholly unnecessary to the disposition of the case.

Additionally, respondent is constrained to suggest that the dictum proposes an unrealistic and, ultimately, an unworkable test. Many social problems should and must be addressed by governmental implementation of multiple, and occasionally overlapping, programs. To require complete separation of special needs from crime control would be to

discourage government from simultaneously developing several programs to deal with various aspects of a social ill. The problem presented by this case is an obvious, but by no means the only, example. The purpose of parole is to supervise recently incarcerated offenders who have been released and are attempting to adjust to a free and largely unregulated society. To that end, parolees are subject to conditions to ensure that they reintegrate into society. But as criminal offenders who pose a sufficient threat to society that imprisonment was the appropriate punishment, they need to be monitored to protect the public safety. That vital, indeed, "overwhelming," concern should not disqualify parolee supervision as a "special need."

Fourth, in *Ferguson* this Court reaffirmed the validity of *Griffin*, in which police had initiated contact with the probation office, encouraged probation officers to search the probationer's residence, accompanied them during the search, and processed the evidence produced by the search, which evidence was used not merely to revoke probation but was given to the district attorney's office to permit prosecution on new charges. *Griffin*, 483 U.S. at 870-72. This Court concluded in *Ferguson* that "*Griffin* is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large." *Ferguson*, 532 U.S. at 81 n.15 (citing *Griffin*, 483 U.S. at 874-75).

Petitioner submits that a parolee's reduced expectation of privacy is "a factor that does not justify application of the 'special needs' doctrine." Br. of Petitioner 35 n.16. The application of the doctrine is triggered by the overwhelming need to supervise more than 100,000 released offenders. As explained in the next section, the lowered expectation of privacy justifies the use of law enforcement personnel.

2. Use Of Law Enforcement Personnel For A Law Enforcement Purpose

Petitioner argues that the "special needs" doctrine is inapplicable because the search was "undertaken by a law

enforcement officer for a law enforcement purpose." Br. of Petitioner 35 (capitalization omitted). He emphasizes that the search was conducted by a police officer, not petitioner's parole officer, "to make sure [petitioner is] still obeying the laws." J.A. 14, 38. Neither circumstance upon which petitioner relies removes the search from the scope of the "special needs" doctrine.

First, the use of law enforcement officers does not offend the doctrine. As this Court observed in *New York v. Burger*, 482 U.S. 691, in which police officers conducted a warrantless search of an automobile junkyard,

> many states [that use police for such purposes] do not have the resources to assign the enforcement of a particular scheme to a specialized agency. So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself. In sum, we decline to impose upon the State, the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents.

Id. at 717-18 (footnote omitted).

California invests parole officers and "other peace officer[s]" with the authority to conduct parole searches. Cal. Penal Code § 3067(a). This empowerment rationally serves the California parolee supervision program. Indeed, it is doubtful that the program could function without the participation of police officers. As stated earlier, more than 130,000 parolees—equivalent to the population of a city—are released in California at any given time. It is unrealistic to expect parole officers to surveil the streets 24 hours a day in search of parolees who may violate the conditions of their paroles. Given the number and potential mobility of parolees, the statute wisely deploys all available personnel in the supervision of those parolees.

That this necessary use of law enforcement officers is permissible under the Fourth Amendment is illustrated by *Griffin v. Wisconsin*, 483 U.S. 868. In *Griffin*, to repeat, police initiated contact with the probation office, encouraged the probation officers to conduct the search, were present during the search, processed the evidence and used it in the probationer's criminal prosecution. This active participation did not invalidate the application of the "special needs" doctrine for reasons equally applicable to this case: the reduced expectation of privacy of parolees and the overwhelming need to supervise their activities closely.

Second, petitioner erroneously submits that the officer's purpose—to ascertain whether petitioner was obeying the laws—removes the search from justification under the "special needs" doctrine. One condition of parole, of course, is that the parolee obey all laws, Cal. Code Regs. tit. 15, § 2512(4). And here the officer did no more than determine whether petitioner was complying with the conditions of parole. *Griffin* again serves as a suitable benchmark. In that case, the police officer requested the probation officers to search the probationer's home for guns, the possession of which was both a crime and a violation of the terms of probation. All parolees and probationers are required to obey the law as a requirement of their conditional release. *Griffin* teaches that a search for evidence relevant both to criminal activity and a violation of the terms of conditional release nevertheless falls within the "special needs" doctrine.

Petitioner also suggests that the search was not a "special needs" inspection because the evidence was used in a subsequent criminal prosecution. It is apparently his position that the product of a "special needs" search can be used only for the administrative purpose of parole revocation (or, as here, potential administrative placement in a drug treatment program, California Penal Code section 3063.1(a)). Just as a search cannot be justified by what it produces, *United States v. DiRe*, 332 U.S. 581, 595 (1948), so it cannot be invalidated by the ultimate use of its fruits. "In law it is good or bad when it starts

. . . ." *Id.* The officer's conduct of the search conformed to the Fourth Amendment. Its product therefore could be used for all purposes, including a criminal prosecution.

For these reasons, the search of a parolee by a parole agent or any law enforcement officer to supervise that parolee is a "special needs" search within the meaning of this Court's Fourth Amendment jurisprudence. To determine the reasonableness of the search, this Court must consider the nature of the privacy interest affected by the search, the character of the intrusion, the nature and immediacy of the State's concerns, and the efficacy of the means for meeting them. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. at 830-38; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. at 654-65.

B. The California Parole Search Condition Satisfies This Court's "Special Needs" Doctrine

A balance of the relevant concerns establishes that the California parole search condition is reasonable under the Fourth Amendment. That balance was extensively discussed in Argument II, *ante*, and requires only a brief review.

1. The Parolee's Interest

A California parolee is subject to numerous conditions that greatly limit his or her freedom in order to ensure adequate supervision. In California, the parolee is expressly informed that he or she may be searched by a parole agent or law enforcement officer at any time with or without cause. Taken together, these conditions, particularly the search condition, have "significantly diminished [a parolee's] reasonable expectation of privacy." *United States v. Knights*, 534 U.S. at 120.

2. Degree Of Intrusion

In this connection, it must be emphasized that parolees are protected by statute and decisional law from searches that

are conducted solely for the purposes of harassment, Cal. Penal Code § 3067(d); *People v. Reyes*, 19 Cal. 4th at 753-54, 968 P.2d at 451, 80 Cal. Rptr. 2d at 740, and those that are unreasonable by virtue of their intensity. Argument I-B, *ante*.

3. The State's Interest

It bears repeating that this Court has described a state's interest in the management of its parole system as "overwhelming." *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. at 365. The need to supervise parolees in general is sufficiently compelling that this Court has said (in connection with the supervision of probationers) that it "permit[s] a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Griffin v. Wisconsin*, 483 U.S. at 875. California's need is greater than that of any other State. During 2000 in California, over 126,000 inmates were paroled and 90,000 were returned to prison following a new crime or a violation of parole conditions. Argument I-C, *ante*.

4. Efficacy Of Search Condition

As explained in Argument I-D, *ante*, a suspicionless search condition is more efficacious than one requiring reasonable suspicion. If parole agents and law enforcement officers can search a parolee without acquiring reasonable suspicion, they will not need to corroborate tips. Consequently, they can act quickly, a circumstance which will deter parolees from violating the terms of their paroles.

C. Conclusion

In light of petitioner's—and all California parolees'—greatly diminished expectation of privacy and the State's overwhelming need to supervise parolees effectively, a suspicionless search in a public place does not violate the Fourth Amendment. The *de minimis* expectation of privacy possessed by parolees is adequately protected by the State's prohibition of searches conducted solely for the purpose of harassment.

III.
PETITIONER VALIDLY CONSENTED TO THE PAROLE SEARCH CONDITION

Finally, petitioner claims that his consent cannot justify the search in this case, arguing: (1) an inmate must accept parole and its attendant conditions, including the search condition; (2) California did not seek to justify the search under a consent rationale in the State courts; and (3) in any event, the consent rationale is inapplicable as a matter of law. Petitioner is incorrect

A. A California Inmate May Reject Parole By Refusing The Search Condition

California Penal Code section 3067(a) provides that "[a]ny inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure . . . ." Under section 3067(b), "any inmate who does not comply with the provisions of subdivision (a) shall lose worktime credit earned . . . on a day-for-day basis and shall not be released until he or she either complies with the provision of subdivision (a) or has no remaining worktime credit, which ever occurs earlier." *See also* Cal. Penal Code § 3060.5 ("the parole authority shall revoke the parole of any prisoner who refuses to sign a parole agreement . . . .")

People v. Reyes, 19 Cal. 4th 743, 968 P.2d 445, 80 Cal. Rptr. 2d 734, cited by petitioner for the proposition that parole must be granted by the State and accepted by the inmate upon the service of a defined period and the accrual of credits, is not applicable to the present circumstances. As explained in Argument I-B at 9 n.6, *ante*, the search at issue in *Reyes* was conducted before 1997; section 3067 applies only to parole conditions of inmates who committed their offenses after January 1, 1997. § 3067(a).

In *People v. Willis*, 28 Cal. 4th 22, 46 P.3d 898, 120 Cal.

Rptr. 2d 105, the California Supreme Court correctly stated that "[u]nder section 3067, a California *parolee* must agree 'to be subject to search or seizure by a parole or other peace officer . . .." *Id.* at 39, 46 P.3d at 908-09, 120 Cal. Rptr. 2d at 118 (emphasis added). The critical word is "parolee." If the inmate has been granted parole, he has agreed to the condition; if he has not accepted the condition, he is not a parolee. In 1999, when petitioner complied with section 3067(a), he had a choice. He could have refused to comply with that provision, in which event he would not have been released. Petitioner's submission that a California parolee may not consent to parole and the search condition is untenable.

B. This Issue Is Properly Before This Court

Petitioner next submits that the Court should not consider the consent rationale because respondent did not seek to justify the search on that basis in State court. In fact, at the suppression hearing, the State introduced the search condition, signed by petitioner, in which he "agreed to search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause." J.A. 48. The contents of petitioner's agreement were before the State courts.

This issue is properly before this Court. This Court may consider "the questions set out in the petition, or fairly included therein . . . ." Sup. Ct. R. 14.1(a). Petitioner has challenged the constitutionality of a California's parole search condition, which permits suspicionless searches. The suspicionless search of a citizen, even a nonparolee, is valid if conducted pursuant to that person's consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Consequently, this Court may determine whether petitioner consented and, if so, whether that consent validated the search.

C. The Consent Of A Parolee Is Valid

Although the validity of consent to search is usually a question of fact, *Schneckloth v. Bustamonte*, 412 U.S. 218,

petitioner contends that the consent of a parolee is invalid as a matter of law. He argues that any inmate has "little genuine option to refuse." Br. of Petitioner 41. The import of his argument, it may be inferred, is that an inmate who refuses to consent to search will be denied parole and remain in prison. This argument is without merit.

Although the Fourth Amendment generally requires that a search be authorized by a judicial warrant based upon probable cause, it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. at 219; *accord Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Washington v. Chrisman*, 455 U.S. 1, 9-10 (1982). That principle is consistent with the general rule, articulated "in the context of a broad array of constitutional and statutory provisions," that "presumes the availability of waiver." *New York v. Hill*, 528 U.S. 110, 114 (2000) (internal quotation marks omitted); *see also United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution"); *Peretz v. United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are . . . subject to waiver."). Consent must be voluntary to be constitutionally valid, *Schneckloth*, 412 U.S. at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968), but an individual's consent to search may be deemed voluntary, for Fourth Amendment purposes, even if it is motivated by the subject's belief that refusal to consent will result in concrete disadvantages. In describing the benefits of consent searches, the Court in *Schneckloth* observed that "[i]f the [consent] search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search." 412 U.S. at 228. Plainly, then, a consent search cannot be found involuntary

simply because an individual consents out of a desire to avoid a greater intrusion.

This Court's decision in *Zap v. United States*, 328 U.S. 624 (1946), reflects the view that an individual's consent to search may be deemed voluntary even when that consent is a required condition for receipt of a valuable government benefit. The petitioner in *Zap* "entered into contracts with the Navy Department under which he was to do experimental work on airplane wings and to conduct test flights." *Id.* at 626. Pursuant to statutory requirement, *id.*, the contract between the parties stated that "[t]he accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government." *Id.* at 627. Government agents subsequently inspected petitioner's business books and records over his objection. *Id.* This Court held that the search was lawful, explaining that "when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.* at 628.

Zap further establishes the proposition—central to this case—that a consent to search may be granted in advance, and without specific restrictions. The defendant in *Zap* did not give consent at the time the search was conducted; to the contrary, he attempted (unsuccessfully) to prevent the search from occurring. 328 U.S. at 627. The Court nevertheless found that the defendant was bound by his prior contractual commitment to permit inspection of his books and records. *Zap* makes clear that an individual may give valid and binding prospective consent to a category of searches to be performed at unspecified times in the future.[13]

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13. The judgment in *Zap* was subsequently vacated on other grounds. *See Zap v. United States*, 330 U.S. 800 (1947). This Court has continued to treat *Zap* as good law, however, and has cited it as authority for

A parolee's consent to search given as a condition of release is not rendered involuntary by the fact that the alternative is continued incarceration. Petitioner appears to suggest that a potential parolee has no choice but to accept a consent to search provision. That suggestion appears to rest on one of two propositions. First is the notion that an individual would not, under any circumstances, make a voluntary decision to accept a prison term. That proposition is demonstrably false: criminal defendants can and often do enter pleas of guilty (with or without plea agreements) that they know will result in substantial periods of incarceration, generally because they regard their alternatives as even more unattractive. This Court has repeatedly recognized that a guilty plea is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. *See Corbitt v. New Jersey*, 439 U.S. 212, 218-23 (1978); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Brady v. United States*, 397 U.S. 742, 755 (1970).

Alternatively, the view that a parolee lacks any true choice in the matter may rest instead on the perception that no one would choose to spend time in prison in preference to release on parole because parole, even with a consent-to-search condition, is substantially less onerous than incarceration. That reasoning is also flawed. The government cannot be said to coerce an individual simply by presenting him with a choice in which one of the alternatives is plainly more attractive than the other. No one would suggest, for example, that a defendant's guilty plea is involuntary if the government offers him a particularly favorable plea agreement. In short, no legal principle supports the view that an individual's waiver of constitutional rights is rendered unenforceable whenever the benefits of that waiver substantially outweigh its costs.

California parolees in general, and petitioner in

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the proposition that a search based on consent is lawful notwithstanding the absence of a judicial warrant and/or probable cause. *See Schneckloth*, 412 U.S. at 219; *Katz v. United States*, 389 U.S. 347, 358 n.22 (1967); *Texas v. Brown*, 460 U.S. 730, 736 (1983) (plurality opinion).

particular, are given a meaningful choice: conditional liberty with reduced Fourth Amendment protection or continued incarceration with no expectation of privacy. *Hudson v. Palmer*, 468 U.S. 517. "Nothing is more common than an individual's consenting to a search that would otherwise violate the Fourth Amendment, thinking that he will be better off than he would be standing on his rights." *United States v. Barnett*, 415 F.3d 690, 692 (7th Cir. 2005). Confronted with the alternative of continued incarceration, petitioner "gave up nothing." *Id.*

D. Conclusion

For these reasons, the question of the validity of petitioner's consent is properly before this Court and must be resolved in respondent's favor.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Dated: January 13, 2006

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Supreme Court, U.S.
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No. 04-9728

IN THE
Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

I. The Search Was Unreasonable Under A Balancing Analysis 1

A. The Search Condition Is Unreasonable Because It Grants Unconstrained Discretion To Officers In The Field. 1

B. The Harm To Privacy Interests Outweighs The Benefit To The State's Interests. 6

II. The "Special Needs" Doctrine Does Not Justify The Search 14

III. The "Consent" Rationale Does Not Apply. 17

TABLE OF AUTHORITIES

CASES

Page(s)

Almeida-Sanchez v. *United States*, 413 U.S. 266 (1973) 2, 6, 17
Berger v. *New York*, 388 U.S. 41 (1967) 3, 4
Boyd v. *United States*, 116 U.S. 616 (1886) 3
Bumper v. *North Carolina*, 391 U.S. 543 (1968) 19
Burrell v. *McIlroy*, 423 F.3d 1121 (9th Cir. 2005) 12
California v. *Greenwood*, 486 U.S. 35 (1988) 11
Camara v. *Municipal Court*, 387 U.S. 523 (1967) 1, 2, 11
Cardinale v. *Louisiana*, 394 U.S. 437 (1969) 19
City of Indianapolis v. *Edmond*, 531 U.S. 32 (2000) 13,14
Delaware v. *Prouse*, 440 U.S. 648 (1979) 1, 3, 13, 14
Ferguson v. *City of Charleston*, 532 U.S. 67 (2001) 14, 15, 16
Florida v. *J.L.*, 529 U.S. 266 (2000) 12
Florida v. *Wells*, 495 U.S. 1 (1990) 2
Griffin v. *Wisconsin*, 483 U.S. 868 (1987) 2, 3, 7, 15, 17
Illinois v. *Lidster*, 540 U.S. 419 (2004) 2, 6, 11
INS v. *Delgado*, 466 U.S. 210 (1984) 11
Marshall v. *Barlow's, Inc.*, 436 U.S. 307 (1978) 11
Michigan Dep't of State Police v. *Sitz*, 496 U.S. 444 (1990) 2, 5, 6
Minnesota v. *Murphy*, 465 U.S. 420 (1984) 20
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 7
Nat'l Treasury Employees Union v. *Von Raab*, 489 U.S. 656 (1989) 2, 4, 11
New Jersey v. *T.L.O.*, 469 U.S. 325 (1985) 2, 13
New York v. *Burger*, 482 U.S. 691 (1987) 16
Payton v. *New York*, 445 U.S. 573 (1980) 2, 10, 11, 17

Pennsylvania Board of Probation & Parole v. *Scott*, 524 U.S. 357 (1998) 13, 14, 15
People v. *Buckley*, 2003 WL. 122258 (Cal. Ct. App., Jan 7, 2003) 18
People v. *Burgener*, 714 P.2d 1251 (Cal. 1986) 7, 18
People v. *Guzman*, 107 P.3d 860 (Cal. 2005) 18
People v. *Huntley*, 371 N.E.2d 794 (NY 1977) 12
People v. *Jefferson*, 980 P.2d 441 (Cal. 1999) 18
People v. *Lewis*, 74 Cal. App. 4th 662 (Cal. Ct. App. 1999) 18
People v. *Reyes*, 968 P.2d 445 (Cal. 1998) 4, 9, 10, 17, 19
People v. *Sanders*, 73 P.3d 496 (Cal. 2003) 8, 18
People v. *Willis*, 46 P.3d 898 (Cal. 2002) 18
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 2, 5, 11, 15
Smith v. *Maryland*, 442 U.S. 735 (1979) 7
Soca v. *State*, 673 So. 2d 24 (Fla. 1996) 12
Terry v. *Ohio*, 392 U.S. 1 (1968) 5, 12
United States v. *Biswell*, 406 U.S. 311 (1972) 16
United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) 2, 13, 17
United States v. *Crawford*, 372 F.3d 1048 (9th Cir. 2004) 18
United States v. *Johnson*, 427 F.3d 1053 (7th Cir. 2005) 12
United States v. *Knights*, 534 U.S. 112 (2001) ..... *passim*
United States v. *Monteiro*, 270 F.3d 465 (7th Cir. 2001) 9
United States v. *Ramsey*, 411 U.S. 606 (1977) 17
United States v. *United States District Court*, 407 U.S. 297 (1972) 2
Vernonia School Dist. 47J v. *Acton*, 515 U.S. 646 (1995) 2, 5, 6, 13

CONSTITUTIONAL PROVISION, STATUTES & REGULATIONS

U.S. Const. amend. IV ..... *passim*
18 U.S.C. § 3563 9
18 U.S.C. § 3583. 9
28 C.F.R. § 2.204 9
Cal. Penal Code § 3000 ..... 8, 18
Cal. Penal Code § 3060.5 19
Cal. Penal Code § 3067 ..... 3, 17, 18, 19
Cal. Penal Code § 12021 18
1996 Cal. Stat. 4656-57 19
Cal. Code Regs. tit. 15, § 2511 19
Cal. Code Regs. tit. 15, § 2512 18

OTHER

S. Ct. Rule 15.2 17
A.B. 2284, 1995-96 Reg. Legis. Session (Cal. 1996) (amended May 6, 1996) 19
A.B. 2284, 1995-96 Reg. Legis. Session (Cal. 1996) (amended Aug. 26, 1996) 19
S. Comm. on Crim. Proc., *Comm. Rep. for Assembly Bill 2284*, 1995-96 Reg. Legis. Session (Cal. 1996) 19
Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547 (1999) 3
Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (4th ed. 2004) 20
Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1970) 3
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Joan Petersilia, Challenges of Prisoner Reentry and Parole in California, 12 CPRC 3 (June 2000) 10
Jeremy Travis and Sarah Lawrence, California's Parole Experiment, Urban Institute Justice Policy Center (Aug. 2002) 10
U.S. Dept. of Justice, Bureau of Justice Statistics, Trends in State Parole 1990-2000 (Oct. 2001) 10
U.S. Parole Comm'n R. & Proc. Man. 9

The search in this case failed to meet the most fundamental requirement of reasonableness under the Fourth Amendment: the police officer's discretion to search Petitioner was not limited by an individualized suspicion standard or by other adequate safeguards. The Fourth Amendment was adopted precisely to prohibit discretionary searches by officers in the field. Accordingly, the States' leeway to search parolees under the Fourth Amendment does not extend to the search in this case. Indeed, Respondent stands virtually alone among all the States and the federal government in authorizing the search at issue here.

I. The Search Was Unreasonable Under A Balancing Analysis.

A. The Search Condition Is Unreasonable Because It Grants Unconstrained Discretion To Officers In The Field.

"The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials." *Delaware* v. *Prouse*, 440 U.S. 648, 653-54 (1979). In most cases, discretion is limited by requiring "that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test" such as reasonable suspicion. *Id.* at 654 (note omitted). Where "the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Id.* at 654-55 (quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967)). In case after case, the Court has reaffirmed that grants of "standardless and unconstrained discretion" violate the Fourth

Amendment.[1] *Id.* at 661. The Court has applied this fundamental principle in cases analyzed under the "special needs" doctrine as well as under general Fourth Amendment balancing analysis.[2]

The requirement that the individual officer's discretion to search be limited is central to the Fourth Amendment. "[T]he evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband by officers of the Crown." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 335 (1985). "The hated writs of assistance" granted the King's officers "blanket authority to search where they pleased." *Payton* v. *New York*, 445

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[1] *See, e.g., United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (roving Border Patrol stop unreasonable because the "Fourth Amendment demands something more than the broad and unlimited discretion sought by the government"); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 270 (1973) (search unreasonable because it was "conducted in the unfettered discretion of the members of the Border Patrol"); *United States* v. *United States District Court*, 407 U.S. 297, 317 (1972) ("those charged with . . . investigative . . . duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks"); *Camara*, 387 U.S. at 532-33. *See also Florida* v. *Wells*, 495 U.S. 1, 4-5 (1990) (container search unreasonable because State "had no policy whatever with respect to the opening of closed containers encountered during an inventory search").

[2] *See, e.g., Illinois* v. *Lidster*, 540 U.S. 419, 428 (2004) ("police stopped all vehicles systematically"); *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646, 650 (1995) (no discretion to select students for drug tests); *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 454 (1990) (fixed sobriety checkpoint limits officer's discretion to make stops); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 622 (1989) ("minimal discretion" to administer drug tests); *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 667 (1989) (drug test "automatic"). In other special needs cases, the individual officer's discretion is limited by an individualized suspicion requirement. *See, e.g., Griffin* v. *Wisconsin*, 483 U.S. 868, 871 (1987) (probation officer's discretion limited by requirements of "reasonable grounds" and supervisor approval); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 342 n.8 (1985) (reasonable suspicion requirement).

U.S. 573, 583 n.21 (1980). In 1761 James Otis denounced writs of assistance as "the worst instrument of arbitrary power" because they "'placed the liberty of every man in the hands of every petty officer.'" *Id.* (quoting *Boyd* v. *United States*, 116 U.S. 616, 625-27 (1886)). John Adams described Otis's denunciation as "the first scene of the first act of opposition to the arbitrary claims of Great Britain," and declared: "[T]hen and there the child Independence was born." *Id.* *See also Berger* v. *New York*, 388 U.S. 41, 58 (1967) (general warrants were "a motivating factor behind the Declaration of Independence").[3]

California's parole search condition permits the very evil that the Fourth Amendment forbids. By its terms, the search condition grants individual officers discretion to search parolees such as Petitioner, their houses, and their effects at any hour of the day or night, with or without a warrant and with or without cause. J.A. 48; Cal. Penal Code § 3067(a). Respondent placed Petitioner's liberty "in the hands of every petty officer." Unlike the probation officer in *Griffin*, the police officer in this case was not subject to a state regulation that required him to have "reasonable grounds" for a search and obtain approval from a supervisor. *Griffin*, 483 U.S. at 871. Instead, Officer Rohleder, like the officer in *Prouse*, was not "acting pursuant to any standards, guidelines, or procedures . . . promulgated by either his department or the State Attorney General." *Prouse*, 440 U.S. at 650. Officer Rohleder testified that sometimes he

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[3] *See also* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 51-105 (1970); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 578 (1999) ("delegation of discretionary authority to ordinary, 'petty,' or subordinate' officers was anathema to framing-era lawyers"); Tracey Maclin, *The Central Meaning of the Fourth* Amendment, 35 Wm. & Mary L. Rev. 197, 248 (1993) ("[T]he central purpose of the Fourth Amendment" is "distrust of discretionary police power."); NACDL Amicus Br. 16-18.

searches parolees and sometimes he does not. J.A. 39 ("I don't go after everybody all the time."). That is precisely the unconstrained discretion that is forbidden by the Fourth Amendment.

Contrary to Respondent's contention (Br. 10-12) the officer's discretion to search Petitioner was not effectively constrained by the requirement of California law that parolee searches not be "arbitrary, capricious, or harassing."[4] This Court has never held that such a general standard is a constitutionally adequate limitation on the officer's discretion. Moreover, California has interpreted its "arbitrary, capricious, and harassing" standard in a way that ensures it is *not* an effective limitation on the officer's discretion to search. The California Supreme Court has held that a search is "arbitrary, capricious, or harassing" only if "the motivation for the search is *unrelated* to rehabilitative, reformative, or legitimate law enforcement purposes." *People* v. *Reyes*, 968 P.2d 445, 451 (Cal. 1998) (emphasis added). *See also* Resp. Br. 11 (California forbids searches conducted "solely to harass"). *Any* search for evidence of criminal activity is at least related to a legitimate law enforcement purpose. So long as the officer testifies that he was looking for evidence of crime, the search satisfies California's standard. Respondent's argument would justify searches pursuant to writs of assistance, so long as the officer searched for contraband or other evidence of crime.

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[4] The United States briefly contends (U.S. Br. 20) that the officer's discretion was properly limited because the search condition applies only to persons on parole. That is contrary to this Court's decisions, which have insisted that the individual officer's discretion must be limited even when only a subsection of the general population is subject to search. *See, e.g., Von Raab*, 489 U.S. at 667; *Berger*, 388 U.S. at 59 (statute authorizing wiretaps of a particular named person or persons "leaves too much to the discretion of the officer executing the order").

The emptiness of California's "arbitrary, capricious, and harassing" standard is confirmed by the undisputed fact that no California court has *ever* held that a parolee or probationer search violated the standard. *See* Pet. Br. 20. *See also* Resp. Br. 15 (noting that more than 130,000 persons are on parole in California at any given time).

Respondent contends (Br. 10, 12-13) that the "arbitrary, capricious, and harassing" standard prohibits searches that occur at an unreasonable hour or are unreasonably prolonged, frequent, or humiliating. The Court has never accepted such marginal limitations on discretion as constitutionally sufficient. Otherwise, searches pursuant to writs of assistance would be constitutional so long as they were not too lengthy or frequent.

The unprecedented *scope* of the searches authorized by California's search condition further expands the officer's discretion and renders California's "objective" limitations ineffective. A parolee search in California is unlike a search authorized by a warrant, which is "narrowly limited in its objectives and scope," *Skinner*, 489 U.S. at 622, because of the constitutional requirement that the warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. It is also unlike a warrantless frisk for weapons based upon reasonable suspicion, which must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry* v. *Ohio*, 392 U.S. 1, 29 (1968). And a parolee search in California is unlike the suspicionless searches this Court has approved, which have also been limited in scope. *See, e.g.*, *Vernonia*, 515 U.S. at 658; *Sitz*, 496 U.S. at 453. Unlike searches this Court has found to be reasonable, California's parole search condition grants police officers blanket authority to search parolees, their houses, and their effects for evidence of *any* crime. The police officer

is not required to consider, or even know, what crimes the parolee has committed or is likely to commit. The single fact justifying the search is that the person is on parole. Lengthy, frequent, and intrusive searches can be justified on the ground that they might conceivably turn up evidence of *some* crime.[5] It is therefore not surprising that the California courts have not invalidated a single parolee or probationer search on any of these grounds.

In short, the search of Petitioner "was conducted in the unfettered discretion of" the police officer and "thus embodied precisely the evil" this Court repeatedly has held to be impermissible under the Fourth Amendment. *Almeida-Sanchez*, 413 U.S. at 270.

B. The Harm To Privacy Interests Outweighs The Benefit To The State's Interests.

1. Suspicionless Searches Effectively Extinguish Parolees' Privacy Interests And Invade The Privacy Of Third Parties. A search condition that subjects a person to searches by any law enforcement officer at any time of the day or night, without a warrant and without cause, undeniably is an extreme intrusion upon personal privacy. The degree of intrusion in this case thus differs sharply from other cases in which the Court has upheld suspicionless searches. *See, e.g., Lidster*, 540 U.S. at 427 ("interfered only minimally"); *Vernonia*, 515 U.S. at 660 (invasion of privacy "not significant"); *Sitz*, 496 U.S. at 451 ("slight" intrusion).

Respondent contends (Br. 9) that the extreme intrusion upon Petitioner's privacy is entitled to no weight because Petitioner had "no subjective expectation

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[5] For example, Respondent could defend a home search conducted after midnight on the ground that forbidding such searches would allow parolees to engage in criminal activity during those hours. Similar arguments could be made in defense of frequent and intrusive searches.

of privacy whatever." That contention conflicts with this Court's recognition that, while probationers are subject to "a degree of impingement upon privacy that would not be constitutional if applied to the public at large," "[t]hat permissible degree is not unlimited" and may be "exceeded." *Griffin*, 483 U.S. at 875. The Court has also recognized that a parolee's "condition is very different from that of confinement in a prison . . . [and] includes many of the core values of unqualified liberty." *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972). Under this Court's decisions, Petitioner clearly had *some* legitimate expectation of privacy.[6]

Respondent does not dispute that suspicionless searches of parolees entail "a massive intrusion on the privacy interests of third persons solely because they reside with a parolee." *People* v. *Burgener*, 714 P.2d 1251, 1269 (Cal. 1986). In this case, the search of Petitioner plainly intruded on the privacy interests of third persons. Petitioner's two companions were effectively stopped and one of them, Deborah Watson, was searched. Watson testified that she did not consent to the search; the officer testified that she did. J.A. 11, 56-57. If Watson had not associated with Petitioner, there is no reason to think that the officer would have sought to search her. Watson's association with Petitioner thus placed her in a situation in which she was required to choose between consenting to a humiliating public search by a police officer or risking the consequences of refusing to consent.

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[6] Respondent contends (Br. 9) that Petitioner's subjective expectation of privacy was extinguished because he was notified that he could be searched by any police officer without cause. But notice, by itself, cannot extinguish all legitimate expectations of privacy. *See Smith* v. *Maryland*, 442 U.S. 735, 740 n. 5 (1979) ("[I]f the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry," loss of subjective expectation of privacy would play "no meaningful role" in the Fourth Amendment analysis).

Many reasonable citizens would think twice about associating with a person who subjects them to such risks.

2. Suspicionless Searches Do Not Further The State's Interest In Reintegrating Parolees Into The Community. The California Supreme Court has recognized that "[m]any law-abiding citizens might choose not to open their homes to probationers [or parolees] if doing so were to result in the validation of arbitrary police action. If increased numbers of probationers were not welcome in homes with supportive environments, higher recidivism rates and a corresponding decrease in public safety may be expected, both of which would detract from the optimal successful functioning of the probation system." *People* v. *Sanders*, 73 P.3d 496, 508 (Cal. 2003) (brackets in original) (marks and citation omitted). Respondent does not dispute this, but instead dismisses it as a "social concern[]" that is not addressed by the Fourth Amendment. Resp. Br. 16. That is clearly incorrect. This Court has recognized that, for purposes of the Fourth Amendment, one of the State's two legitimate concerns with a probationer is "that he will successfully complete probation and be integrated back into the community." *United States* v. *Knights*, 534 U.S. 112, 120-21 (2001). California also recognizes that "reintegration of the offender into society" is a primary purpose of parole. Cal. Pen. Code § 3000(a)(1). The fact that suspicionless searches give third parties an incentive not to associate with parolees, and thus make it more difficult for parolees to reintegrate into society, is plainly relevant to the constitutional balancing analysis and weighs against suspicionless searches.

3. The State's Interest In Preventing Parolee Crime Does Not Justify Suspicionless Searches. Respondent and its amici do not dispute that California stands virtually alone in authorizing the search in this case. With the possible exception of South Dakota, no other State allows police officers to conduct suspicionless

searches of parolees absent consent or a particularized determination that such searches are reasonable in the circumstances. *See* Pet. Br. 28-31 & App. 12a-19a.[7]

The United States acknowledges that the federal government has "elected to impose an individualized suspicion standard" on parolee searches. U.S. Br. 23 n.8 (citing U.S. Parole Comm'n R. & Proc. Man. (Aug. 2003)).[8] Moreover, the federal statutes governing "supervised release" (which has largely replaced parole in the federal system) omit *any* search condition—let alone a suspicionless search condition—from both the general conditions of supervised release *and* the discretionary conditions specified by statute. *See* 18 U.S.C. §§ 3563(b) & 3583(d). Only a federal court may impose a search condition as a condition of supervised release, and then only upon a finding that the condition is "appropriate" and "involves no greater deprivation of liberty than is reasonably necessary." *Id.* § 3583(d)(2).[9]

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[7] Respondent asserts (Br. 18) that many States prohibit suspicionless parolee searches because they have concluded that such searches are unconstitutional. That is so, but the constitutional analysis includes an assessment of "the degree to which [the search] is needed." *Knights*, 534 U.S. at 119. The fact that "the vast majority of jurisdictions that have considered the issue" disagree with California supports Petitioner's position. *People* v. *Reyes*, 968 P.2d 445, 453 (Cal. 1998) (Kennard, J., dissenting).

[8] The United States describes this requirement as having "no legal force," U.S. Br. 23 n.8, but it represents the federal government's considered determination that suspicionless parolee searches are inappropriate. Moreover, the Parole Commission's regulations require that *any* search condition be based on an individualized determination of need. 28 C.F.R. § 2.204(b)(2)(iv).

[9] The United States asserts (U.S. Br. 1) that federal courts have imposed search conditions "similar" to the one in this case in "some" cases. But it cites only one case in support of that proposition, and in that case the court reversed the district court in part despite "exceptional conditions that required exceptional vigilance." *United States* v. *Monteiro*, 270 F.3d 465, 467-68 (7th Cir. 2001); *see also id.* at (continued...)

There is no evidence that other States and the federal government experience greater parolee recidivism, compared to California, because they do not authorize police officers to search parolees in the absence of reasonable suspicion of wrongdoing. *See Payton*, 445 U.S. at 602 (considering "absence of any evidence that effective law enforcement has suffered" in other States). To the contrary, California's recidivism rates are higher than those of most other States despite its authorization of suspicionless parolee searches.[10] Nor is there any evidence that the California Supreme Court's elimination of the reasonable suspicion requirement in *Reyes* has led to a decrease in recidivism in California. Instead, recidivism rates in California remained virtually unchanged following *Reyes*.[11]

Respondent contends (Br. 19) that, regardless of the practices of other States and the federal government, the Court should defer to California's determination that

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470-71 (discussing other cases in which appellate court invalidated search condition).

[10] Parolees nationwide successfully completed parole at twice the rate of parolees in California during the 1990s. U.S. Dept. of Justice, Bureau of Justice Statistics, *Trends in State Parole 1990-2000*, at 11 (Oct. 2001). *See also* Joan Petersilia, *Challenges of Prisoner Reentry and Parole in California*, 12 CPRC 3 (June 2000). The difference between California and other States largely results from California's decision to imprison parolees for technical violations at rates well above the national average. *See* Jeremy Travis and Sarah Lawrence, *California's Parole Experiment*, Urban Institute Justice Policy Center, at 5 (Aug. 2002) ("The vast majority of the returns to prison in California are for technical violations, such as missing an appointment with a parole officer or failing a drug test—not for new crimes. It is in this area of policy and practice that California departs most sharply from national trends."). Indeed, "[n]early two-thirds of [California] prison admissions are for parole violations, compared to about one-third nationally." *Id.*

[11] *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Trends in State Parole 1990-2000*, at 11 (Oct. 2001) (noting that 19.4% of California parolees were successfully discharged from parole in 1990, 20.9% were discharged in 1995, and 21.3% were discharged in 1999).

suspicionless parolee searches are justified. But Fourth Amendment balancing analysis requires the Court to weigh the harm to privacy interests against the gain to the State. *Knights*, 534 U.S. at 118-19. *See also Payton*, 445 U.S. at 578, 600 (1980) (statutorily-authorized search unreasonable); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 324-25 (1978) (same); *Camara*, 387 U.S. at 534 (same). To the extent that the Court may properly defer to legislatures and law enforcement entities in striking this balance, the overwhelming judgment of those bodies is that police officers should not be permitted to conduct suspicionless parolee searches. *See California* v. *Greenwood*, 486 U.S. 35, 43 (1988) (Court has "never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs").

The Court has held that some suspicionless searches are reasonable in situations in which "the concept of individualized suspicion has little role to play." *Lidster*, 540 U.S. at 424; *see also Von Raab*, 489 U.S. at 668 ("probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions"). Similarly, the Court has noted that "[r]ailroad supervisors," "school officials," and "hospital administrators" "are not in the business of investigating violations of the criminal laws" and "have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence." *Skinner*, 489 U.S. at 623. Police officers, in contrast, *are* in the business of investigating violations of the criminal laws, and *do* have occasion to become familiar with requirements such as probable cause and reasonable suspicion.

Although the reasonable suspicion standard requires only "some minimal level of objective justification" for a search, *INS* v. *Delgado*, 466 U.S. 210, 217 (1984), Respondent contends that the standard would not be met

if a police officer received an "uncorroborated tip" that a parolee is engaged in criminal activity. Resp. Br. 18 (citing *Florida* v. *J.L.*, 529 U.S. 266 (2000)). There was no indication that J.L. was a parolee, and Respondent's argument assumes that parole status cannot be considered as a factor in determining whether there is reasonable suspicion of criminal activity. Courts have recognized that prior criminal history may be considered in determining whether there is reasonable suspicion,[12] and have applied similar reasoning to parolee and probationer searches. *See Soca* v. *State*, 673 So. 2d 24, 25 n.1 (Fla. 1996) ("probationary status may be used as a factor to establish probable cause"); *People* v. *Huntley*, 371 N.E.2d 794, 797 (NY 1977) ("fact of parole status may well be significant" in establishing probable cause).

Respondent also contends (Br. 20) that in some circumstances, such as *Terry* stops, all citizens are subject to a reasonable suspicion standard, and thus applying that standard to parolees in all circumstances would sometimes afford them the same Fourth Amendment rights as citizens in general. That is also incorrect. Where the reasonable suspicion standard applies to citizens in general, it authorizes only a limited search, such as a brief pat-down for weapons. *Terry*, 392 U.S. at 26. In the case of a parolee, reasonable suspicion provides the basis for a much broader search. *Knights*, 534 U.S. at 115, 122. Moreover, the question in this case is not whether suspicionless stops of parolees are reasonable (since Petitioner is not challenging the stop and frisk in this case). Instead, the question is whether an officer, having stopped a parolee and frisked him for weapons,

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[12] *See, e.g., United States* v. *Johnson*, 427 F.3d 1053, 1057 (7th Cir. 2005) ("[A]lthough a law enforcement officer's knowledge of a suspect's criminal history may support the existence of reasonable suspicion, such knowledge in itself is not enough.") (citation omitted); *Burrell* v. *McIlroy*, 423 F.3d 1121, 1124 n.3 (9th Cir. 2005) (same).

may proceed to a full-blown search in the absence of any reasonable suspicion.

Respondent unquestionably has a strong interest in protecting society from crimes committed by parolees. But "the gravity of the threat alone cannot be dispositive." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 42-43 (2000). Moreover, States have great flexibility to search parolees within the limits imposed by the Fourth Amendment. Under *Knights*, neither a search warrant nor probable cause is required. The exclusionary rule does not apply in parole revocation hearings. *Pennsylvania Board of Probation & Parole* v. *Scott*, 524 U.S. 357, 369 (1998). Other avenues are open to Respondent. *See Prouse*, 440 U.S. at 663 (State is free to develop methods "that involve less intrusion or that do not involve the unconstrained exercise of discretion"). For example, California is free to adopt statutory or regulatory guidelines on parolee searches similar to those adopted by the United States or other States. It could also seek to impose a suspicionless search condition based on a particularized determination of need.[13] What Respondent may not do, consistent with the Fourth Amendment, is grant individual police officers unfettered discretion to search parolees.

The harm to individual privacy in this case outweighs any gain to the State's legitimate interests. Moreover,

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[13] The Fourth Amendment does not impose a "least restrictive means" test under which a search is unreasonable *solely* because the government has alternative means of achieving its purposes that are less invasive of individual privacy. *See, e.g., Vernonia*, 515 U.S. at 663. But the existence of effective alternatives is a *factor* in the reasonableness analysis. *See, e.g., T.L.O.*, 469 U.S. at 343 (Fourth Amendment "ensure[s] that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools"); *Brignoni-Ponce*, 422 U.S. at 881, 883 n.8 (1975) (considering "availability of alternatives to [suspicionless] random stops" and "absence of practical alternatives" to stops based on reasonable suspicion).

granting police officers unconstrained discretion to search is not a permissible means of combating crime under the Fourth Amendment. Accordingly, the search was unreasonable.

II. The "Special Needs" Doctrine Does Not Justify The Search.

Respondent contends (Br. 21-31) that the "special needs" doctrine provides an alternative justification for the search. The United States, apparently recognizing that a balancing analysis does not favor Respondent, advances the "special needs" doctrine as the primary justification for the search. U.S. Br. 8-27. This Court's decisions clearly point to the conclusion that the special needs doctrine does not apply in this case. And even if it did, the search could not be justified under that doctrine.

In *Edmond*, the Court held that "a 'general interest in crime control'" cannot serve as the "justification for a regime of suspicionless stops." 531 U.S. at 41 (quoting *Prouse*, 440 U.S. 648, 659 n.18 (1979)). *See also id.* at 54 (Rehnquist, C.J., dissenting) (special needs doctrine "has been used to uphold certain suspicionless searches performed for reasons unrelated to law enforcement"). In *Ferguson* v. *City of Charleston*, 532 U.S. 67 (2001), the Court reaffirmed that the "special needs" doctrine applies only where the "special need" advanced as the justification for the search is "divorced from the State's general interest in law enforcement." 532 U.S. at 79. *See also id.* at 88 (Kennedy, J., concurring) ("special needs" cases "do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives").

Petitioner was searched by a police officer engaged in law enforcement, and thus the "special needs" doctrine does not apply. Police officers are "engaged in the often competitive enterprise of ferreting out crime." *Scott*, 524

U.S. at 368 (marks and citation omitted). *See also Ferguson*, 532 U.S. at 100 (Scalia, J., dissenting) (law enforcement officials "ordinarily have a law enforcement objective"). Officer Rohleder confirmed that he searched petitioner "to make sure he's still obeying the laws." J.A. 38.

In *Griffin*, the Court applied the special needs doctrine to a probationer search. But the search in *Griffin*, unlike the search in this case, was "carried out entirely by the probation officers." 483 U.S. at 871. The Court's opinion stressed that while "a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen." *Id.* at 876. The Court observed that probation officers have "an ongoing supervisory relationship" with the probationer that "is not, or at least not entirely, adversarial," and a probation agency can "proceed on the basis of its entire experience with the probationer, and . . . assess probabilities in the light of its knowledge of his life, character, and circumstances." *Id.* at 879; *see also Scott*, 524 U.S. at 368 (parole officers, unlike police officers, have a "relationship with parolees [that] is more supervisory than adversarial"). In this case, unlike *Griffin*, no parole officer had any involvement in the search.

Moreover, the Court explained in *Ferguson* that *Griffin* must be read in the light of the Court's subsequent decisions applying the "special needs" doctrine, which have clearly required that "there was no law enforcement purpose behind the searches" and "little if any, entanglement with law enforcement." 532 U.S. at 79 n.15. In addition, a post-*Griffin* decision expressly "reserved the question whether 'routine use in criminal prosecutions of evidence obtained pursuant to [an] administrative scheme'" would invalidate the search program. *Id.* (quoting *Skinner*, 489 U.S. at 621 n.5).

Respondent seeks to rely on the Court's statement in *Ferguson* that "*Griffin* is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large." 532 U.S. at 79 n.15. But a lesser expectation of privacy may lead to a reduced degree of Fourth Amendment protection under a balancing analysis (as the Court held in *Knights*). But it has no logical bearing on whether the search is conducted by a police officer for a law enforcement purpose, and thus is irrelevant to whether the "special needs" doctrine applies here. In *Knights*, the Court applied general Fourth Amendment balancing analysis, rather than "special needs" analysis, to a police officer's search of a California probationer. The same analysis applies here. *See* Pet. Br. 36-37.

Even if the "special needs" doctrine did apply, it would not justify the search in this case. The Court's "special needs" cases have "employed a balancing test." *Ferguson*, 532 U.S. at 78. For the reasons explained in Part I above, the balance here tips decidedly against Respondent. In particular, this Court's decisions applying the special needs doctrine have required either individualized suspicion or other safeguards to limit the discretion of the officer in the field. *See* note 1, *supra* (collecting cases). In *New York* v. *Burger*, 482 U.S. 691 (1987), cited by Respondent (Br. 28), the Court dealt with searches of regulated businesses rather than human beings. The Court emphasized that a "properly administrative" regulatory scheme "must limit the discretion of the inspecting officers," and "must be 'carefully limited in time, place, and scope.'" *Id.* at 703 (quoting *United States* v. *Biswell*, 406 U.S. 311, 315 (1972)). The Court noted that officers were "allowed to conduct an inspection only during the regular and usual business hours," and the scope of the search was limited to "the records as well as any vehicles or parts of vehicles which are subject to the record keeping requirements" of the statute. *Id.* at 711-12 (brackets and marks omitted).

The parole search condition at issue in this case imposes no such limitations on the discretion of police officers.[14]

III. The "Consent" Rationale Does Not Apply.

Contrary to Respondent's contention (Br. 32-37), the search in this case cannot be upheld on a consent rationale.[15] The California Supreme Court has held that "[t]he consent exception to the warrant requirement may not be invoked to validate the search of an adult parolee" in California. *Reyes*, 968 P.2d at 448. The court explained that, under California law, "parole is not a matter of choice. The Board of Prison Terms must provide a period of parole; the prisoner must accept it. Without choice, there can be no voluntary consent to inclusion of the search condition." *Id.* (citation omitted). This Court is bound by the California Supreme Court's interpretation of state law. *See Griffin*, 483 U.S. at 875.

Respondent incorrectly contends (Br. 32-33) that the California Supreme Court's rejection of the consent rationale in *Reyes* was superseded by Cal. Penal Code § 3067. *Reyes* was decided after the enactment of Section 3067, and subsequent decisions have reaffirmed its

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[14] Searches made at the border (rather than *near* the border as in *Brignoni-Ponce* and *Almeida-Sanchez*) are in a special category: "'[S]earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.'" *United States* v. *Flores-Montano*, 541 U.S. 149, 152-53 (2004) (quoting *United States* v. *Ramsey*, 411 U.S. 606, 616 (1977)). That rationale does not apply to parolee searches.

[15] Respondent did not argue in the courts below or in its brief in opposition to certiorari that Petitioner consented to the search. Accordingly, Respondent is not entitled to raise the issue here. *See* S. Ct. Rule 15.2; *Payton* v. *New York*, 445 U.S. at 583.

holding that the consent rationale does not apply to parole search cases in California.[16]

Section 3067 does not provide that an "inmate will not be released until he or she has agreed to all parole conditions." Resp. Br. 9 n.6. Instead, it provides that an inmate shall not be released on parole until he agrees to the search condition "or has no remaining worktime credit, *whichever occurs earlier.*" Cal. Penal Code § 3067(b) (emphasis added). [17] Respondent's contention also conflicts with other provisions of California law. *See* Cal. Penal Code § 3000(b)(1) ("At the expiration of a term . . . of imprisonment imposed pursuant to Section 1170 . . . the inmate shall be released on parole . . ."); *Burgener*, 714 P.2d at 1266 n.12 (describing § 3000(b)(1) as a "mandatory kick-out" provision); Cal. Code Regs. tit. 15, § 2512(a) ("[P]arole conditions are not a contract but are specific rules governing all parolees whether or not the

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[16] *See, e.g., People* v. *Guzman*, 107 P.3d 860, 867 (Cal. 2005) (parole is "mandatory from the offender's perspective"); *Sanders*, 73 P.3d at 503 n.3 (search condition "imposed as a condition of parole, which defendant could not refuse"); *People* v. *Willis*, 46 P.3d 898, 908-09 (2002) ("Under section 3067, a California parolee must agree 'to be subject to search or seizure by a parole officer or other peace officer.'"); *People* v. *Lewis*, 74 Cal. App. 4th 662, 668 (Cal. Ct. App. 1999) (parole search conditions are "automatic, and imposed on every parolee" in California); *People* v. *Buckley*, 2003 WL 122258, at *4 (Cal. Ct. App., Jan 7, 2003) (unpublished) ("parole search condition is not justified by a consent theory since parolees have no choice but to accept a search condition"). *See also United States* v. *Crawford*, 372 F.3d 1048, 1063-64 (9th Cir. 2004) (en banc) (Trott, J., concurring) ("It is a conceptual mistake to consider the imposition of conditions on a parolee in California as a 'waiver' of rights . . . . [T]he consent/waiver doctrine is irrelevant in this context.").

[17] In California "most felonies"—including violations of California Penal Code § 12021, for which Petitioner was sentenced—"carry a 'determinate' prison sentence consisting of a specific number of months or years in prison." *People* v. *Jefferson*, 980 P.2d 441, 445 (Cal. 1999). A prisoner sentenced to a determinate sentence "must be released upon *expiration* of his 'term' less good-time credits." *Id.* at 447 (alteration in original) (marks and citation omitted).

parolee has signed the form containing the parole conditions."); *id.* § 2511 (notice of parole must contain parole search condition).

The legislative history of § 3067 confirms its plain meaning. The California Assembly passed a bill that would have provided that an inmate "shall not be released on parole unless he or she agrees" to the search condition. A.B. 2284, 1995-96 Reg. Legis. Session, at 14 (Cal. 1996) (amended by Assembly on May 6, 1996). The bill would have accomplished this result by "provid[ing] that all terms of imprisonment are indeterminate." S. Comm. on Crim. Proc., *Comm. Rep. for Assembly Bill 2284*, 1995-96 Reg. Legis. Session, at 3 (Cal. 1996). The Senate rejected this approach and instead passed a provision providing only for loss of worktime credits. A.B. 2284, 1995-96 Reg. Legis. Session, at 7 (Cal. 1996) (amended by Senate on Aug. 26, 1996). The Senate's version was enacted into law. 1996 Cal. Stat. 4656-57.[18]

Even if the consent rationale was properly presented in this case and not foreclosed by California statutes and judicial decisions, Respondent has not proved that Petitioner consented to blanket suspicionless searches, and that his consent was "freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U.S. 543, 548-49 (1968).[19]

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[18] Respondent also cites Cal. Penal Code § 3060.5, but that provision deals with revocation of parole, not refusal to grant parole, and it went into effect long before *Reyes* was decided. The California Supreme Court expressly considered § 3060.5 in its opinion in *People* v. *Burgener* and concluded that parolees in California do not consent to suspicionless searches. 714 P.2d 1251, 1266 n.12 (Cal. 1986). The court reaffirmed that conclusion in *Reyes*.

[19] "Questions not raised below are those on which the record is very likely to be inadequate." *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). Here, a single witness testified that Petitioner signed a document consenting to suspicionless searches. J.A. 48. But the witness testified that he was not present when the document was signed and could not say whether the signature is Petitioner's. J.A. 50. Moreover, a "Notice and Conditions of Parole" form issued by the (continued...)

Whether the "alternative" to consent was an additional period of imprisonment followed by parole subject to suspicionless searches, or imprisonment (subject to suspicionless searches) for the entire time the prisoner would otherwise be on parole, Petitioner could not avoid being subject to suspicionless searches. Consequently, "to speak of consent in this context is to resort to a manifest fiction, for the probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse." 5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b), at 440-41 (4th ed. 2004) (marks and note omitted). Moreover, the consent rationale could be employed to strip parolees of any number of constitutional rights for lengthy periods, up to and including the remainder of their lives. This Court expressed its disapproval of using the consent rationale to strip probationers of constitutional rights in *Minnesota* v. *Murphy*, 465 U.S. 420, 435 & n.7 (1984), and it did not apply the consent rationale in *Knights*. It should not do so here.

CONCLUSION

The judgment of the court of appeals should be reversed.

California Department of Corrections requires only an acknowledgement that "I have read or have had read to me and understand the conditions of parole as they apply to me." *See* NACDL Br. 1a-2a. This suggests that Petitioner's "agreement," if any, was "essentially no more than acknowledgement of the force of law." *Crawford*, 323 F.3d at 727 (Trott, J., dissenting).

Respectfully submitted,

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February 10, 2006

(6)

Supreme Court, U.S.
FILED
JAN 13 2006
OFFICE OF THE CLERK

No. 04-9728

In the Supreme Court of the United States

DONALD CURTIS SAMSON, PETITIONER

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the suspicionless search of a parolee on a public street by a police officer pursuant to a state statute authorizing such a search violates the Fourth Amendment.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 5
Argument:
A suspicionless search of a parolee authorized by a parole condition mandated by statute complies with the Fourth Amendment 7
A. The parole search of petitioner was constitutional under the special needs doctrine 8
1. The parolee's privacy interest is minimal 9
2. The State's interest in effectively supervising parolees presents a "special need" justifying suspicionless searches 11
3. California's decision to subject parolees to suspicionless searches is a reasonable means of meeting its special supervisory needs 15
4. An officer's discretion to conduct searches is not unbridled 19
5. That suspicionless parole searches also serve law enforcement interests and may be conducted by police officers does not remove them from the ambit of the "special needs" doctrine 24
B. The parole search of petitioner was constitutional under the Fourth Amendment's traditional totality-of-the-circumstances test 27
Conclusion 30

TABLE OF AUTHORITIES

Cases: Page

Board of Educ. of Indep. Sch. Dist. No. 92 v. *Earls*, 536 U.S. 822 (2002) 11, 16, 18

Cabell v. *Chavez-Salido*, 454 U.S. 432 (1982) 26

City of Indianapolis v. *Edmond*, 531 U.S. 32 (2001) 22, 24

Delaware v. *Prouse*, 440 U.S. 648 (1979) 19

Ewing v. *California*, 538 U.S. 11 (2003) 14, 15

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 9, 20, 24, 25

Green v. *Berge*, 354 F.3d 675 (7th Cir. 2004) 13

Griffin v. *Wisconsin*, 483 U.S. 868 (1987) ..... *passim*

Heller v. *Doe*, 509 U.S. 312 (1993) 15

Hudson v. *Palmer*, 468 U.S. 517 (1984) 12, 16

Johnson v. *United States*, 529 U.S. 694 (2000) 1, 2

Jones v. *Cunningham*, 371 U.S. 236 (1963) 9

McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 23

Michigan Dep't of State Police v. *Sitz*, 496 U.S. 444 (1990) 28

Morrissey v. *Brewer*, 408 U.S. 471 (1972) 9, 12

National Treasury Employees Union v. *Von Raab*, 489 U.S. 656 (1989) 16, 18

New Jersey v. *T.L.O.*, 469 U.S. 325 (1985) 7

New York v. *Burger*, 482 U.S. 691 (1987) 20, 26, 29

Ohio v. *Robinette*, 519 U.S. 33 (1996) 28

Cases—Continued: Page

Owens v. *Kelley*, 681 F.2d 1362 (11th Cir. 1982) 17, 27
Pennsylvania Bd. of Probation & Parole v. *Scott*, 524 U.S. 357 (1998) 2, 9, 11, 12, 18, 26, 29
People v. *McCullough*, 6 P.3d 774 (Colo. 2000) 17
People v. *Middleton*, 131 Cal. App. 4th 732 (Ct. App. 2005) 13, 19
People v. *Reyes*, 968 P.2d 445 (Cal. 1998), cert. denied, 526 U.S. 1092 (1999) ..4, 13, 16, 20, 21, 22, 29
People v. *Sanders*, 73 P.3d 496 (Cal. 2003) 20
People v. *Willis*, 46 P.3d 898 (Cal. 2002) 13, 27
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 10, 16
Smith v. *Maryland*, 442 U.S. 735 (1979) 19
Terry v. *Ohio*, 392 U.S. 1 (1968) 7, 21
United States v. *Biswell*, 406 U.S. 311 (1972) 17, 20, 29
United States v. *Caceres*, 440 U.S. 741 (1979) 23
United States v. *Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975) 27
United States v. *Crawford*, 372 F.3d 1048 (9th Cir. 2004), cert. denied, 125 S. Ct. 863 (2005) 12, 14, 15, 21
United States v. *Flores-Montano*, 541 U.S. 149 (2004) .. 22
United States v. *Kincade*, 379 F.3d 813 (9th Cir. 2004), cert. denied, 125 S. Ct. 1638 (2005) 25
United States v. *Knights*, 534 U.S. 112 (2001) 1, 7, 8, 17, 18, 19, 26, 28, 29
United States v. *Martinez-Fuerte*, 428 U.S. 543 (1976) 28

Cases—Continued: Page

United States v. *Monteiro*, 270 F.3d 465 (7th Cir.), cert. denied, 537 U.S. 822 (2002) 1, 27

United States v. *Montoya de Hernandez*, 73 U.S. 531 (1985) 7, 22

United States v. *Ramsey*, 431 U.S. 606 (1977) 22

United States v. *Reyes*, 283 F.3d 446 (2d Cir.), cert. denied, 537 U.S. 822 (2002) 12

United States v. *Villamonte-Marquez*, 462 U.S. 579 (1983) 7

United States v. *Watson*, 423 U.S. 411 (1976) 15

Vernonia Sch. Dist. 47J v. *Acton*, 515 U.S. 646 (1995) 10, 11, 16

Whren v. *United States*, 517 U.S. 806 (1996) 21

Wyman v. *James*, 400 U.S. 309 (1971) 7

Constitution and statutes:

U.S. Const. Amend. IV 7, 8, 13, 24, 27

Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II:

§ 218(a)(5), 98 Stat. 2027 1

§ 235(a)(1), 98 Stat. 2031 1

United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. No. 109-76, § 2, 119 Stat. 2035 2

18 U.S.C. 3563(a)(5) 23

18 U.S.C. 3563 (a)(9) 23

Statutes—Continued: Page

18 U.S.C. 3583(a) 2
18 U.S.C. 3583(b) 2
18 U.S.C. 3583(d) 10, 23
18 U.S.C. 3601 2
18 U.S.C. 4203(b)(4) 2
Cal. Health & Saf. Code § 11377(a) (West 1991) 4
Cal. Penal Code (West):
§ 667.5(b) (1999) 4
§ 830.5 (1992) 26
§ 1170.12(c)(1) (2004) 4
§§ 3000 *et seq.* (2000) 12
§ 3056 (2000) 10
§ 3067 (2000) 13
§ 3067(a) (2000) 2, 13
§ 3067(d) (2000) 21
Cal. Code Regs., tit. 15 (2005):
§ 2512 10
§ 2513 10

Miscellaneous:

Assem. Comm. on Pub. Safety, Comm. Rep. for Assembly Bill 2284, 1995-1996 Reg. Legis. Session (Cal. 1996) 13, 19
California Att'y Gen., *Crime in California* 37 (Apr. 2001) 14
Joan Petersilia, *Challenges of Prisoner Reentry and Parole in California* 12 CPRC (June 2000) 14
Jeremy Travis & Sarah Lawrence, *California's Parole Experiment*, Cal. J., Aug. 2002 14

Miscellaneous—Continued: Page

U.S. Parole Comm'n, *Rules & Procedure Manual* (Aug. 2003) 23

In the Supreme Court of the United States

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DONALD CURTIS SAMSON, PETITIONER

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI
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FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the Fourth Amendment prohibits the suspicionless search of a parolee pursuant to a state statute authorizing the search. The federal government prosecutes cases in which evidence has been obtained pursuant to state parole or probation searches. See *United States* v. *Knights*, 534 U.S. 112 (2001). Moreover, federal courts in some cases have imposed a similar search condition on federal prisoners serving a term of supervised release.[1] See, *e.g.*, *United*

[1] Parole was abolished in the federal system as of November 1, 1987, in favor of supervised release, which is overseen by the sentencing court rather than the United States Parole Commission. See *Johnson* v. *United States*, 529 U.S. 694, 696-697 (2000); Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, §§ 218(a)(5), 235(a)(1), 98

States v. *Monteiro*, 270 F.3d 465 (7th Cir. 2001). The United States has participated in other cases involving Fourth Amendment challenges to state parole and probation conditions, see *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357 (1998); *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987). The United States thus has a significant interest in the Court's disposition of this case.

STATEMENT

1. In September 2002, petitioner was on state parole in California, following a conviction for being a felon in possession of a firearm. J.A. 10, 47, 49. One of the mandatory conditions of his parole was that he agree to be subject to "search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Cal. Penal Code § 3067(a) (West 2000); J.A. 10 n.3, 47-48. Petitioner signed a form agreeing to this condition. J.A. 49.

On the afternoon of September 6, 2002, Officer Alex Rohleder of the San Bruno, California, Police Department, saw petitioner, accompanied by a woman and a

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Stat. 2027, 2031. Supervised release is imposed "as a part of the sentence" to follow imprisonment, with the length of the term varying depending on the severity of the offense (18 U.S.C. 3583(a) and (b)). Supervision is carried out by probation officers (18 U.S.C. 3601). Parole and supervised release are quite similar; as with parole, supervised release is intended to "improve the odds of a successful transition from the prison to liberty." *Johnson*, 529 U.S. at 708-709. The Parole Commission still exists by virtue of several statutory extensions, see United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. No. 109-76, § 2, 119 Stat. 2035, and United States probation officers supervise federal parolees under the authority of 18 U.S.C. 4203(b)(4).

small child, walking down the street. Officer Rohleder recognized petitioner from a prior contact and knew that he was on parole. Rohleder had heard from other officers that petitioner "might have a parolee at large warrant." J.A. 10. Rohleder parked his patrol car, approached petitioner and asked if he could speak with him. J.A. 10, 32.

Officer Rohleder asked petitioner if "he had a warrant at that time." J.A. 10. Petitioner replied that there had been a parole warrant for his arrest, but that he "had already taken care of it" and had been "released from custody." J.A. 10, 32, 36. Rohleder knew that when San Francisco police officers previously arrested petitioner for a domestic violence incident, petitioner had stated that the police "weren't going to take him back to prison." J.A. 10, 35, 39, 43-44. Rohleder learned by radioing his dispatcher that petitioner had finished serving a term for a prior parole violation, and that he was not subject to a parole warrant.[2] Rohleder decided to conduct a parole search of petitioner because it was a condition of parole. J.A. 10, 36-38. Rohleder explained: "I believe that being [a] parolee, that [petitioner] needs to make sure he's still obeying the laws. It's a privilege for him to be out here." J.A. 10, 38. Rohleder testified that he did not search parolees "all the time," but conducted parole searches on a "regular basis." J.A. 11, 39, 44. Rohleder intended to let petitioner go if he had nothing illegal on him. J.A. 11, 44. During the search,

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[2] At the suppression hearing, petitioner's parole agent testified that petitioner had been released in September 2001 after serving 10 months' imprisonment for a parole violation. J.A. 50-51. Further, on June 24, 2002, petitioner was arrested on a parole warrant, placed in custody, and released on August 28, 2002, less than two weeks before the challenged search. J.A. 51-52.

which Officer Rohleder conducted following a preliminary pat-down for weapons, J.A. 65, Rohleder found a cigarette box in petitioner's left breast pocket. Inside the box was a plastic baggie containing methamphetamine. J.A. 11, 33.

2. Petitioner was charged with possession of methamphetamine (Cal. Health & Safety Code § 11377(a) (West 1991)) and moved to suppress the evidence. The trial court denied the motion, finding that the search was authorized, "prudent," and neither arbitrary nor capricious. J.A. 63. Petitioner proceeded to trial and was convicted by a jury of the charge against him. J.A. 9. After finding that petitioner had a prior felony conviction (Cal. Penal Code § 1170.12(c)(1) (West 2004)) and had served prior prison terms (*id.* § 667.5(b) (West 1999)), the trial court sentenced petitioner to seven years of imprisonment. J.A. 7, 9.

3. The California Court of Appeals, relying on *People* v. *Reyes*, 968 P.2d 445 (Cal. 1998), cert. denied, 526 U.S. 1092 (1999), upheld the parole search. J.A. 9-14. In *Reyes*, the California Supreme Court rejected a challenge to the constitutionality of the State's parole search condition, holding that a parolee within the State is properly subject to suspicionless searches so long as they are not "arbitrary, capricious, or harassing." 968 P.2d at 450. The California Court of Appeals in this case found "nothing arbitrary or capricious in the search." J.A. 13. In particular, the court found that Officer Rohleder had not detained petitioner "indiscriminately or at his whim, but rather recognized him as a parolee, and thought he may be subject to an outstanding 'parolee at large warrant.'" J.A. 14 (quoting J.A. 32). The court further found that "[t]he lawful basis for the search did not dissipate when Rohleder learned that the

warrant was not active," because petitioner's parole status justified a search, as Rohleder testified, "to determine whether [petitioner], as a parolee, was 'still obeying the laws.'" *Ibid.* (quoting J.A. 38). The reasonableness of the search was additionally supported by "[t]he testimony by Officer Rohleder that he customarily searches identified parolees" because that practice "indicates that the search was not conducted by the officer for the purpose of harassment or due to any personal animosity toward [petitioner]." *Ibid.* Finally, the court found that the search "was not unreasonable in duration or the circumstances of its execution." *Ibid.*

4. The California Supreme Court denied petitioner's petition for review. J.A. 30.

SUMMARY OF ARGUMENT

The suspicionless search of petitioner in accordance with his statutorily mandated parole condition is constitutional under the special needs doctrine. Under that doctrine, special governmental interests "beyond the normal need for law enforcement" (*Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987)) will justify searches conducted without a warrant or probable cause where the State's special needs outweigh the searched party's privacy interests.

In *Griffin*, this Court upheld the warrantless search of a probationer's home without probable cause because it was conducted pursuant to a state regulation designed to serve the special need of supervising probationers. The Court explained that the State's interest in rehabilitating probationers and in protecting the community from their commission of additional crimes justified relaxing the traditional warrant and probable cause re-

quirements with respect to a class of persons whose liberty is only "conditional." *Griffin*, 483 U.S. at 874-880.

California's operation of its parole system presents a special need no less than Wisconsin's operation of its probation system. Parolees present a serious threat to public safety. California's need to combat that threat and to ensure that parolees' behavior remains consistent with their conditions of parole outweighs the parolee's substantially diminished expectation of privacy. California's judgment that those twin goals are most effectively served by authorizing suspicionless searches is reasonable and entitled to deference. The California Supreme Court has addressed the concern that a suspicionless search condition affords police officers too much discretion by holding that a parolee retains Fourth Amendment protection against arbitrary, capricious, or harassing searches. The California legislature has reinforced that protection by forbidding searches conducted solely for purposes of harassment.

California's decision to enlist police officers in the administration of its parole regime does not remove this case from the special needs domain. *Griffin* made clear that the State's operation of its probation system is a special need notwithstanding that a principal goal of that system is to combat recidivism and notwithstanding the close nexus between probation officers and other law enforcement officers. The State's special need to supervise parolees is no less served by authorizing a police officer to search a parolee, so long as that search is conducted in accordance with the regulatory regime, as was the case here.

Even if this Court concludes that the special needs doctrine is inapplicable, the search is constitutional under the totality-of-the-circumstances test that this Court

applied in *United States* v. *Knights*, 534 U.S. 112 (2001). That test, like the special needs test, balances the individual's privacy interests against the government interests served by the search, but, of course, does not require that those government interests constitute a special need. That balancing comes out in the State's favor, just as it does under special needs, because a parolee's privacy interests are severely diminished and the State has an overwhelming interest in combating recidivism by parolees under its supervision.

ARGUMENT

A SUSPICIONLESS SEARCH OF A PAROLEE AUTHORIZED BY A PAROLE CONDITION MANDATED BY STATUTE COMPLIES WITH THE FOURTH AMENDMENT

The suspicionless search of petitioner conducted pursuant to a parole search condition mandated by statute did not violate the Fourth Amendment. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985). See *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983). In defining the contours of reasonableness under the Fourth Amendment, this Court has repeatedly said that "the specific content and incidents of this right must be shaped by the context in which it is asserted." *Wyman* v. *James*, 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968)).

The relevant context here is that petitioner was on parole when Officer Rohleder conducted the search. In *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), this Court upheld, under the "special needs" doctrine, the

warrantless search of a probationer's home that was conducted pursuant to a Wisconsin regulation and supported by reasonable suspicion. And in *United States* v. *Knights*, 534 U.S. 112 (2001), this Court upheld, under the "totality of the circumstances," a warrantless search of a probationer's home that was conducted pursuant to a probation search condition and supported by reasonable suspicion.

Griffin and *Knights* both emphasized that probationers are categorically different from ordinary citizens for purposes of the Fourth Amendment because probationers have a diminished expectation of privacy (*Griffin*, 483 U.S. at 874; *Knights*, 534 U.S. at 119), and because they are "more likely than the ordinary citizen to violate the law." *Griffin*, 483 U.S. at 880; see *Knights*, 534 U.S. at 121. Both decisions also emphasized the importance of the State's need to combat recidivism. *Griffin*, 483 U.S. at 875, 876, 878, 880; *Knights*, 534 U.S. at 120-121. As explained below, the reasons this Court identified in *Griffin* and *Knights* for upholding the probation searches there support the conclusion that the search of petitioner, a parolee subject to a statutory search condition and protected against oppressive or harassing searches, was constitutional under either *Griffin*'s special needs rationale or *Knights*'s general totality-of-the-circumstances approach.

A. The Parole Search Of Petitioner Was Constitutional Under The Special Needs Doctrine

Under this Court's "special needs" doctrine, special governmental interests "beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin*, 483 U.S. at 873. In such cases, the Court "employ[s] a balancing test that

weigh[s] the intrusion on the individual's interest in privacy against the 'special needs' that supported the program." *Ferguson* v. *City of Charleston*, 532 U.S. 67, 78 (2001). Applying that test here, California's interests in ensuring that parolees honor the conditions that justified their conditional release and in combating parolee recidivism create a special need that justifies permitting police officers to conduct suspicionless searches of parolees pursuant to a search condition mandated by statute.

1. ***The parolee's privacy interest is minimal***

A parolee does not enjoy "the absolute liberty to which every citizen is entitled, but only * * * the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972); see *Griffin*, 483 U.S. at 874 (emphasizing conditional liberty of probationers). Indeed, "[p]arole is a 'variation on imprisonment of convicted criminals,' in which the State accords a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release." *Pennsylvania Board of Probation & Parole* v. *Scott*, 524 U.S. 357, 365 (1998) (quoting *Morrissey*, 408 U.S. at 477). For that reason, the degree of privacy that a parolee may legitimately expect cannot be determined by reference to the privacy rights of the population at large. Rather, it must be judged by reference to the legally authorized treatment of convicted offenders and, more particularly, the character and purposes of parole.

Parole "significantly restrain[s] [a parolee's] liberty to do those things which in this country free men are entitled to do." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963). As a legal matter, "[u]ntil discharged from pa-

role, [a prisoner] remains under the custody of the Department of Corrections." See Cal. Penal Code § 3056 (West 2000) ("Prisoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the inclosure of the prison."). Consistent with the parolee's status as a convicted criminal whose release is conditional, California law imposes substantial restrictions on a parolee's freedom of action. For example, California parolees must report to their parole officer immediately upon release; inform their parole officer about a change of employment location or status within 72 hours; obtain prior approval from their parole officer for travel beyond 50 miles from their residence and prior written approval to leave California or to stay outside their county of residence for more than 48 hours; and must not possess firearms and many other types of weapons. Cal. Code Regs., tit. 15 § 2512 (2005). In addition, many parolees must participate in psychiatric treatment; abstain from drinking alcohol; submit to drug testing; and refrain from participating in gang activity. *Id.* § 2513.[3]

Given the extensive range of impairments of freedom to which parolees have long been subjected, their expectation of privacy is substantially diminished. Cf. *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 654-657 (1995) (concluding that student athletes "have a reduced expectation of privacy" in large part on account of the regulations that flow from "the schools' custodial and tutelary responsibility for children"); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989) (concluding that railroad employees' expectation of pri-

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[3] Similar restrictions are imposed on supervised releasees in the federal system. See 18 U.S.C. 3583(d).

vacy is "diminished by reason of their participation in an industry that is regulated pervasively to ensure safety"). Because the scope of petitioner's legitimate expectation of privacy is so narrow, the State has substantial latitude to impose intrusive conditions in effecting its supervisory responsibilities over him. See *Scott*, 524 U.S. at 365 (rejecting application of exclusionary rule to parole revocation proceedings, which "States have wide latitude under the Constitution to structure" because parolees enjoy only conditional liberty); *Acton*, 515 U.S. at 654 (observing that custodial relationship between student and "State as schoolmaster" is "[c]entral" to reasonableness of suspicionless drug testing of student athletes); *Board of Educ. of Indep. Sch. Dist. No. 92* v. *Earls*, 536 U.S. 822, 831 (2002) (observing that decision in *Acton* "depended primarily upon the school's custodial responsibility and authority" and relying on that same factor to uphold suspicionless drug testing of students engaged in extracurricular activities).

2. The State's interest in effectively supervising parolees presents a "special need" justifying suspicionless searches

Balanced against petitioner's substantially diminished privacy rights is California's compelling interest in effectively supervising him. In *Griffin*, this Court upheld a warrantless search of a probationer's home that was conducted on reasonable suspicion pursuant to a Wisconsin regulation. The Court explained that the "State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, * * * presents 'special needs' beyond normal law enforcement" that justified a "departure[] from the usual warrant and probable-cause

requirements." 483 U.S. at 873-874. In particular, the Court identified rehabilitation of the offender and protection of the community from recidivism as the two "goals" that justify "the exercise of supervision to assure that the restrictions [on liberty] are in fact observed." *Id.* at 875.

California's operation of its parole system presents no less of a special need. Indeed, California "has an 'overwhelming interest' in ensuring that a parolee complies with" the "conditions of his release." *Scott*, 524 U.S. at 365 (quoting *Brewer*, 408 U.S. at 483). Parolees, in contrast to the probationers at issue in *Griffin*, "have been sentenced to prison for felonies and released before the end of their prison terms." *United States* v. *Crawford*, 372 F.3d 1048, 1077 (9th Cir. 2004) (en banc) (Kleinfeld, J., concurring), cert. denied, 125 S. Ct. 863 (2005). See Cal. Penal Code §§ 3000 *et seq.* (West 2000). As such, they are "deemed to have acted more harmfully than anyone except those felons not released on parole." *Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring). See *Hudson* v. *Palmer*, 468 U.S. 517, 526 (1984) (those sentenced to terms of imprisonment "have a demonstrated proclivity for antisocial criminal, and often violent, conduct"). Because parolees as a class have been adjudged more dangerous than probationers, the supervisory needs of the State recognized in *Griffin* concerning probation searches apply with even greater force to parole searches. See *United States* v. *Reyes*, 283 F.3d 446, 461 (2d Cir.) (*Griffin* principles "apply *a fortiori*" to "federal supervised release, which, in contrast to probation, is meted out in addition to, not in lieu of, incarceration") (citation omitted), cert. denied, 537 U.S. 822 (2002).

California amended its parole scheme in 1996 by imposing a suspicionless search condition to which all inmates must agree to secure release. Cal. Penal Code § 3067(a) (West 2000) (requiring inmate to agree to permit warrantless searches, regardless of cause, as a mandatory condition of parole); see *People* v. *Willis*, 46 P.3d 898, 908 (Cal. 2002).[4] The author of the bill explained: "Prison inmates are released early from prison regardless of the threat they pose to our communities. We must give our local law enforcement officers the tools they need to adequately supervise these parolees." Assembly Comm. on Pub. Safety, *Comm. Rep. for Assembly Bill 2284*, 1995-1996 Reg. Legis. Session (Cal. 1996) (Bill No. 2284). See *People* v. *Middleton*, 131 Cal. App. 4th 732, 739-740 (Ct. App. 2005) (discussing legislative history of 1996 parole amendments).

Available statistics bear out the pressing need for intensive supervision of parolees. As of August 2000, California had 158,177 inmates in its prisons. During

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[4] The California Supreme Court held in *People* v. *Reyes*, 968 P.2d 445, 448 (1998), that the consent exception cannot validate the search of an adult parolee because parole was "not a matter of choice" under California's Determinate Sentencing Act of 1976. Petitioner was not sentenced under that scheme, however. Under the law enacted in 1996 and applicable to inmates released on parole for offenses "committed on or after January 1, 1997," an inmate's release on parole is conditioned on acceptance of the parole condition. See Cal. Penal Code § 3067 (West 2000). In light of the new law, the government submits, as it argued in *United States* v. *Knights*, No. 00-1260, that petitioner validly consented to suspicionless parole searches as a condition of his parole, which rendered the search of his person by Officer Rohleder reasonable within the meaning of the Fourth Amendment. See *Green* v. *Berge*, 354 F.3d 675, 680 (7th Cir. 2004) (Easterbrook, J., concurring) ("People who object to the conditions of release before the end of their sentences may say no and remain in prison; if they say yes, they have consented to the conditions.").

that year, 126,117 inmates were released on parole. Of that number, 90,000 were returned to prison, following either a conviction for a new crime or for violating a condition of parole. *Crawford*, 372 F.3d at 1069 (Trott, J., concurring) (citing Jeremy Travis & Sarah Lawrence, *California's Parole Experiment*, Cal. J., Aug. 2002). Further, an April 2001 report prepared by the California Criminal Justice Statistics Center indicates that "68% of adult parolees are returned to prison: 55% for a parole violation and 13% for the commission of a new felony offense." *Ibid.* (citing California Attorney General, *Crime in California* 37 (Apr. 2001)). And the California Policy Research Center reports that "70% of the state's paroled felons reoffend within 18 months." *Ibid.* (citing Joan Petersilia, *Challenges of Prisoner Reentry and Parole in California*, 12 CPRC (June 2000)).

Recidivism thus is undeniably a special and extraordinary problem. See *Ewing* v. *California*, 538 U.S. 11, 26 (2003) (opinion of O'Connor, J.) (observing that "[r]ecidivism is a serious public safety concern in California and throughout the Nation" that justifies California's "three-strikes" law). Moreover, independent of the concern with parolees committing new crimes, the State has an interest in ensuring that parolees live up to their conditions of parole. Likewise, the fact that parolees are subject to re-incarceration for conduct that is not otherwise criminal—*e.g.*, from failure to report to association with gang members—underscores how differently situated they are from ordinary citizens. And, of course, the prospect of recidivism only magnifies the importance of vigilance in enforcing parole conditions. Given the alarming numbers of prisoners who commit new offenses shortly after being released on parole, it is difficult to overstate the State's interest in closely monitoring and

supervising parolees to ensure that they comply with the conditions of their release. See *Crawford*, 372 F.3d at 1070-1071 (Trott, J., concurring) ("[T]he control and supervision of parolees as they reintegrate into society [thus] involves an arena far different from the needs of 'normal' law enforcement."). Indeed, the State has a special obligation to prevent crimes by parolees because they are under its supervision and because the State has chosen to release the parolee from confinement before the end of his sentence.

3. California's decision to subject parolees to suspicionless searches is a reasonable means of meeting its special supervisory needs

California has made the judgment that it can most effectively supervise parolees and thereby protect public safety by authorizing parole and police officers to conduct suspicionless searches. This Court should respect that judgment because California is entitled to reasonable latitude in developing the most effective policies to combat parolee recidivism. See *Ewing*, 538 U.S. at 24-25 (opinion of O'Connor, J.) ("[O]ur tradition of deferring to state legislatures in making and implementing * * * important policy decisions" implicating public safety "is longstanding.") (citing cases); *Heller* v. *Doe*, 509 U.S. 312, 320 (1993) ("A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.") (internal quotation marks and citation omitted); cf. *United States* v. *Watson*, 423 U.S. 411, 416 (1976) ("Because there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is "reasonable," [o]bviously the Court should be reluctant to decide that a search thus

authorized by Congress was unreasonable and that the Act was therefore unconstitutional.") (internal quotation marks omitted).

This Court has upheld several other suspicionless search regimes as effective means to meet governmental special needs. See *Earls*, *supra*; *Acton*, *supra*; *Skinner*, 489 U.S. at 624 ("[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."); *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989) (upholding suspicionless drug testing of Customs Service employees whose jobs would involve drug interdiction or require carrying firearms). The result here should be no different.

In upholding the constitutionality of a parole condition authorizing police officers and parole officers to conduct suspicionless searches, the California Supreme Court concluded that "the purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches." *People* v. *Reyes*, 968 P.2d 445, 451 (1998). That conclusion about the deterrent effect of random searches is unassailable. A suspicionless search condition provides a powerful incentive for the parolee to comply with parole conditions and avoid further criminal behavior because, by increasing the likelihood that improper behavior will be detected, it dramatically increases the risk he faces by engaging in conduct that violates the terms of his parole. See *Griffin*, 483 U.S. at 875 ("Recent research suggests that more intensive supervision can reduce recidivism."); cf. *Palmer*, 468 U.S. at 528 ("The uncertainty that attends random searches of cells renders these searches perhaps the most effective weapon of the prison admin-

istrator in the constant fight against the proliferation of [weapons and drugs]."); *United States* v. *Biswell*, 406 U.S. 311, 316 (1972) (upholding statutorily authorized warrantless search of the defendant gun dealer's locked storeroom because, among other reasons, "unannounced, even frequent, inspections are essential" to deter and detect illegal firearms trafficking).

California could reasonably have concluded that a parole search condition pegged to a reasonable suspicion standard would not provide a sufficient level of deterrence. If the possibility of a search is remote, the search condition will not influence the parolee's conduct or ferret out misconduct carried out with stealth. Because many parole violations and many crimes, including the one for which petitioner was prosecuted here, are relatively easy to conceal, and because parolees, facing the threat of parole revocation, have a special incentive to conceal them, see *Knights*, 534 U.S. at 120, a search condition predicated on reasonable suspicion may well fail to deter violations as effectively as the suspicionless search condition California has required. See *Owens* v. *Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982) ("[A] requirement that searches only be conducted when officers have 'reasonable suspicion' or probable cause that a crime has been committed or that a condition of probation has been violated could completely undermine the purpose of the search condition."); *People* v. *McCullough*, 6 P.3d 774, 781 (Colo. 2000) (en banc) ("Requiring individualized suspicion would eliminate a powerful deterrent to parole violations and, consequently, would place in jeopardy the State's overwhelming interest in ensuring that a parolee complies with the conditions of his parole.").

A search condition based on reasonable suspicion also might not be as effective in detecting criminal activity and removing a recidivist or parole violator from the street in the event deterrence fails, as it did here. As this Court explained in *Von Raab*, searches conducted "without any measure of individualized suspicion" may be justified where the government not only "seeks to prevent the development of hazardous conditions," but also "to detect violations that rarely generate articulable grounds for searching any particular place or person," and where the government's need to do so "is sufficiently compelling." 489 U.S. at 668 (emphasis omitted).[5] California's interest in combating recidivism and parole violations by offenders under its supervision amply justifies suspicionless searches of parolees—individuals who, by virtue of their criminal conviction, pose a demonstrated threat to the safety of the community, and whose high rates of recidivism have been thoroughly documented. Cf. *Von Raab*, 489 U.S. at 673, 677 (upholding suspicionless drug testing of Customs officers in the absence of any documented history of drug use by those employees).[6]

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[5] Given the enormous number of inmates who are released on parole each year and given their high rate of recidivism, petitioner's suggestion (Pet. Br. 27) that suspicionless search conditions be approved on a case-by-case basis is not well taken. This Court has permitted the State to regard offenders in the criminal justice system categorically as a threat to public safety, see *Knights*, 534 U.S. at 121; *Scott*, 524 U.S. at 365; *Griffin*, 483 U.S. at 880, and there is no sound reason to depart from that approach here. See *Earls*, 536 U.S. at 837 ("[T]his Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means.").

[6] Petitioner asserts (Pet. Br. 23) that suspicionless searches could undermine the State's interest in rehabilitating prisoners and rein-

4. *An officer's discretion to conduct searches is not unbridled*

One of petitioner's principal complaints about the suspicionless search condition is that it gives law enforcement officers "[u]nconstrained [d]iscretion." Pet. Br. 17. Petitioner is mistaken for several reasons. First, the authority is strictly limited to parolees. The greatest concern presented by the provision of too much discretion to police officers is that they will intrude on the privacy of ordinary citizens. See *Delaware* v. *Prouse*, 440 U.S. 648, 657 (1979) (invalidating random stops of motorists for license and registration check because, among other reasons, stops can involve "unset-

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tegrating them into society because the indignity of such searches will breed resentment in the parolee. The State could reasonably conclude, however, that whatever the risk that suspicionless searches might trigger parolee resentment to a degree that would undermine rehabilitation, that risk was far outweighed by the immediate need to ensure that important steps deemed vital to rehabilitation are taking place and to protect the public from further criminal conduct. See *Middleton*, 131 Cal. App. 4th at 740 n.7 (law establishing the parole condition at issue here "places public safety before all other concerns when deciding whether or not to release a state prison inmate") (quoting Bill No. 2284, at 3). It is for state policymakers, rather than the courts, to make the essentially empirical judgment about the proper balance of considerations bearing on the net efficacy of search conditions.

Petitioner also contends (Pet. Br. 23-24) that a suspicionless search condition discourages others from sharing a residence with parolees. That issue is not presented by this case, which involves the search of petitioner on a public street. See *Knights*, 534 U.S. at 120 n.6 (declining to decide whether probation search condition authorizing suspicionless searches is constitutional because the search at issue was supported by reasonable suspicion); *Smith* v. *Maryland*, 442 U.S. 735, 741 (1979) (in deciding whether an expectation of privacy is reasonable, "it is important to begin by specifying precisely the nature of the state activity that is challenged").

tling show of authority" that "interfere[s] with freedom of movement" and "may create substantial anxiety"). That concern is not implicated by California's statutory parole scheme because an officer is entitled to conduct suspicionless searches only of persons known by him to be parolees. See, *e.g.*, *People* v. *Sanders*, 73 P.3d 496, 505 (Cal. 2003) (search cannot be justified as a valid parole search unless officer is aware that the suspect is on parole and subject to a search condition).

Parolees cannot reasonably expect that law enforcement will give them the same degree of privacy as ordinary citizens enjoy. Rather, parolees can reasonably anticipate that, in their encounters with parole officers or the police, the authorities may well need to seek objective assurance that the parolee is in compliance with the conditions of his release. And petitioner here, having signed an agreement providing that he could be searched by a parole or police officer at any time with or without a warrant or cause, had no basis on which to claim surprise or to be concerned that Officer Rohleder lacked authority when he conducted the search. See *New York* v. *Burger*, 482 U.S. 691, 711 (1987) ("the vehicle dismantler knows that the inspections to which he is subject do not constitute discretionary acts by a government official but are conducted pursuant to statute"); *Biswell*, 406 U.S. at 316 ("When a [gun] dealer chooses to engage in this pervasively regulated business * * *, he does so with knowledge that his business records, firearms, and ammunition will be subject to effective inspection.").

Second, the California Supreme Court has held that a parole condition authorizing suspicionless searches does not authorize searches that are "arbitrary, capricious or harassing." *Reyes*, 968 P.2d at 450. The

Reyes court elaborated that "a parole search could become constitutionally 'unreasonable' if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer." *Id.* at 451 (internal quotation marks omitted). The limitations on timing, frequency, duration, and oppressiveness are objective protections against unreasonable searches. The court further explained that a search is "arbitrary and capricious" when its motivation is "unrelated to rehabilitative, reformative or legitimate law enforcement purposes." *Ibid.* The statute authorizing suspicionless parole searches supplements those standards, requiring that they not be conducted for the purpose of harassment. See Cal. Penal Code § 3067(d) (West 2000). These statutory and judicially crafted restrictions are "meaningful" and "represent workable standards state and federal courts apply every day in assessing the propriety of a variety of government actions." *Crawford*, 372 F.3d at 1072 (Trott, J., concurring).[7]

Petitioner contends (Pet. Br. 19) that the suspicionless search condition authorizes "strip searches and body cavity searches" merely because of his status as a parolee. But *Reyes* held that a suspicionless search condition does *not* extinguish petitioner's rights under the Fourth Amendment, which proscribes searches carried out in an unreasonable manner. 968 P.2d at 450-451. See *Terry*, 392 U.S. at 18 ("[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope."). There

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[7] Other constitutional protections also exist. See, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 813 (1996) (observing that the Equal Protection Clause "prohibits selective enforcement of the law based on considerations such as race").

is nothing inconsistent in saying that suspicionless searches of parolees are generally reasonable, but a particular *manner* of effectuating the search may not be. Cf. *United States* v. *Flores-Montano*, 541 U.S. 149, 154 n.2 (2004) (upholding suspicionless border search of gas tank and leaving open "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out") (quoting *United States* v. *Ramsey*, 431 U.S. 606, 618 n.13 (1977)); *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538, 541 (1985) (observing in the border context that "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion" but requiring reasonable suspicion that traveler is smuggling contraband in her alimentary canal to justify prolonged detention "beyond the scope of a routine customs search and inspection").

Petitioner argues (Pet. Br. 21-22) that the limitations imposed by the California Supreme Court on parole searches are inconsistent with the general rule that the subjective intent of a law enforcement officer plays no role in Fourth Amendment analysis. Nothing in the Fourth Amendment, however, precludes California from providing an additional form of protection for parolees, after having assured a baseline of reasonableness by the objective standards noted above, *i.e.*, whether a parole search becomes unreasonable by its frequency, timing, duration, or oppressiveness. *Reyes*, 968 P.2d at 451. As petitioner points out (Pet. Br. 22), this Court in *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 46 (2000), suggested that an inquiry into the purpose of a regulatory search may be limited to the "programmatic purpose," but it did not deal with a statute like the one at issue in

this case, which makes the searching officer's purpose relevant.

The California Court of Appeals applied its protective standards to the facts of this case and correctly found that Officer Rohleder's search of petitioner was not arbitrary or undertaken for purposes of harassment, was not motivated by any personal animosity towards petitioner, and was not unreasonable in duration or manner of execution.[8] J.A. 13-14.

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[8] Petitioner correctly points out (Pet. Br. 29-31 & n.14) that the United States Parole Commission's *Rules & Procedure Manual* (Aug. 2003) (*Manual*) provides that a special condition "shall permit searches only if the Supervision Officer has a reasonable belief that contraband or evidence of a violation of the conditions of release may be found." *Manual* § 2.204-18(b)(2), at 196 (Notes and Procedures). The Manual's requirement that such searches be based on reasonable suspicion, however, is directed at the officer, was apparently premised on the Commission's reading of *Griffin*, see *Manual* § 2.204-18(a), at 195-196 (Notes and Procedures) (citing *Griffin*), and has no legal force. See, *e.g.*, *United States* v. *Caceres*, 440 U.S. 741 (1979). Moreover, offenders under federal supervision are subject to certain forms of suspicionless searches, including DNA collection and drug testing. See 18 U.S.C. 3563(a)(5) and (9), 3583(d). In any event, the fact that the federal government and other States have elected to impose an individualized suspicion standard does not disable California from concluding that the significant recidivist problem it faces is appropriately dealt with more effectively by not requiring reasonable suspicion and protecting against arbitrariness through other means. Cf. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 90 (1986) ("That Pennsylvania's particular approach [to possession of a weapon] has been adopted in few other States does not render Pennsylvania's choice unconstitutional" because, among other reasons, "our federal system * * * demands tolerance for a spectrum of state procedures dealing with a common problem of law enforcement.") (internal quotation marks and brackets omitted).

5. That suspicionless parole searches also serve law enforcement interests and may be conducted by police officers does not remove them from the ambit of the "special needs" doctrine

Petitioner contends (Pet. Br. 33-35) that the Court's decisions in *Edmond*, *supra*, and *Ferguson*, *supra*, foreclose reliance on the special needs doctrine in this case because the search here served the general interest in crime control and was conducted by a police officer. That contention lacks merit.

In *Edmond*, the Court found unconstitutional the suspicionless seizures of vehicles at a highway checkpoint because its primary purpose was to uncover evidence of drug violations—a purpose that was "indistinguishable from the general interest in crime control." 531 U.S. at 44. Similarly, in *Ferguson*, this Court held that a state hospital violated the Fourth Amendment by testing the urine of pregnant patients for drugs, without obtaining warrants or the consent of the patients involved, and turning positive results over to the police. 532 U.S. at 76-86. The Court rejected the State's argument that the drug testing policy's ultimate goal of protecting the health of pregnant women constituted a "special need" justifying the warrantless intrusions. *Id.* at 81-84. The Court found "special needs" analysis to be inapplicable because the State sought to achieve its ultimate objective through the "use of law enforcement to coerce the patients into substance abuse treatment." *Id.* at 80.

As an initial matter, those cases are inapposite because they involved searches of ordinary citizens. Carrying the restrictions this Court has imposed on searches of ordinary citizens over into searches of parolees would contravene the key holding in *Griffin* that the

need to ensure that the community "is not harmed by the probationer's being at large" permits the State "a degree of impingement upon [a probationer's and parolee's] privacy that would not be constitutional if applied to the public at large." 483 U.S. at 875. Indeed, the Court in *Ferguson* expressly distinguished *Griffin* on the ground that it "is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large." 532 U.S. at 80 n.15. See *United States* v. *Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (en banc) (plurality opinion) ("[T]he whole point of *Ferguson*'s having explicitly distinguished *Griffin* was to harmonize the two cases—not overrule the latter."), cert. denied, 125 S. Ct. 1638 (2005).

Because the search regime at issue here implicates the privacy interests of offenders in the criminal justice system and not ordinary citizens, *Griffin* clearly is the apposite precedent. The only question is whether California's decision to enlist police officers in the administration of its parole supervision regime takes California's policy outside the special needs doctrine. It does not. *Griffin* holds that the pursuit of law enforcement goals—rehabilitation and prevention of recidivism—in the service of a regulatory regime governing the supervision of convicted offenders is itself a special need. See 483 U.S. at 875-880. Indeed, *Griffin* involved a search that was the product of the close collaboration of law enforcement and probation officers. See *id.* at 871 (search that formed basis for Griffin's prosecution was precipitated by tip from police and was conducted by two probation officers who were not Griffin's probation officer, accompanied by three police officers). *Griffin* thus makes clear that the special need that arises in the context of probationers and parolees embodies law en-

forcement objectives, but is nonetheless distinct from the "general interest in crime control" that law enforcement programs targeting ordinary citizens serve.

Officer Rohleder's search was conducted under the auspices of a statute designed to serve the same special supervisory goals as the regulation pursuant to which the search was conducted in *Griffin*.[9] No sound basis for drawing a constitutional line between the two based on the uniform of the law enforcement officer therefore exists. See Cal. Penal Code § 830.5 (West 1992) ("peace officers" include parole and probation officers); *Cabell* v. *Chavez-Salido*, 454 U.S. 432, 443 (1982) ("Even a casual reading of the [California] Penal Code makes clear that the unifying character of all categories of peace officers is their law enforcement function."); *Willis*, 46 P.3d at 908-909 (parole officers, *inter alia*, "often work[] hand in hand with police"; "may 'carry firearms' under specified terms"; may make arrests; and must be trained in the exercise of arrest powers and use of firearms) (quoting Cal. Penal Code § 830.5 (West 1992)); see also *Scott*, 524 U.S. at 375 (Souter, J., dissenting) ("Parole officers * * * often serve as both prosecutors and law enforcement officials in their relationship with probationers and parolees.") (internal quotation marks omitted); cf. *Bur-*

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[9] Contrary to petitioner's suggestion (Pet. Br. 36), this Court in *Knights* did not reject application of the special needs doctrine on the ground that the search was related to a law enforcement purpose. While the Court observed that the search at issue in *Knights* was not "just like" the search in *Griffin*, it did not hold that the special needs doctrine was inapplicable. 534 U.S. at 117-118. Rather, the Court did not reach that issue because it found the search constitutional under the totality of the circumstances regardless of whether it served a special need. *Id.* at 118-122. So too here the Court may uphold the search under the totality of the circumstances without addressing whether it served special needs. See Part B, *infra*.

ger, 482 U.S. at 712-717 (finding no constitutional significance in the fact that police officers were allowed by statute to conduct the warrantless searches of the automobile dismantling businesses and rejecting claim that statute was designed to afford the police an expedient way to enforce criminal laws).[10] The Fourth Amendment does not provide a ready basis for regulating state decisions allocating resources and responsibilities between parole and police officers. Combating parolees' recidivism and promoting their rehabilitation are special needs that a state may address by authorizing police officers to search them.[11]

B. The Parole Search Of Petitioner Was Constitutional Under The Fourth Amendment's Traditional Totality-of-the-Circumstances Test

Knights held that searches of probationers conducted without probable cause or a warrant may be con-

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[10] Several factors justify enlisting the assistance of police officers to conduct parole searches. First, large caseloads may hinder a parole officer's ability to conduct searches, thus decreasing their deterrent value. See *United States* v. *Monteiro*, 270 F.3d 465, 471 (7th Cir. 2001). Second, because police officers have greater training and expertise in conducting searches, parole officers may wish to enlist their assistance, particularly in instances where a search may entail a significant level of risk. Finally, permitting police officers to conduct parole searches "enhance[s] mutual trust between [parole officers] and their [parolees] by allowing the supervisors to avoid searching the [parolee]." *Owens*, 681 F.2d at 1369 & n.14 (citing *United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 270-271 (9th Cir. 1975) (Wright, J., dissenting)).

[11] Outside the parole and probation context, the participation of police officers may have a tendency to belie a stated special need unrelated to law enforcement. But in the parole and probation context here, when the special need is a law enforcement need distinct from general crime control, the participation of one type of law enforcement officer rather than another does not give rise to any comparable inference.

stitutional under the "general Fourth Amendment approach of 'examining the totality of the circumstances,'" regardless of whether they serve a special need or fall under another exception to the warrant requirement. 534 U.S. at 118, 119-122 (quoting *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996)). In so holding, the Court explained that because a probationer is "more likely to engage in criminal conduct than an ordinary member of the community," the State's "interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may * * * justifiably focus on probationers in a way that it does not on the ordinary citizen." *Id.* at 121.[12]

Here, even assuming that Officer Rohleder's role in conducting the parole search rendered the special needs doctrine inapplicable, the search was nonetheless constitutional under *Knights*'s totality-of-the-circumstances analysis. Under that test, the reasonableness of the parole search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118-119 (internal quotation marks omitted).

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[12] *Knights* has thus established a flexible Fourth Amendment framework for evaluating searches of offenders in the criminal justice system that recognizes that such searches serve special law enforcement interests and target a discrete class of individuals with diminished privacy rights. Cf. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding suspicionless seizures of motorists at sobriety checkpoint to promote highway safety); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding suspicionless seizures of motorists at Border Patrol checkpoint to prevent alien smuggling).

As explained above, parolees' privacy rights are significantly diminished by their status as convicted criminals under the supervision of the State, as well as by their written agreement to subject themselves to suspicionless searches as a condition of parole. See *Knights*, 534 U.S. at 119-120 (probationer was "unambiguously informed of" search condition). Balanced against that attenuated expectation of privacy is the "overwhelming" governmental interests advanced by the search condition. See *Scott*, 524 U.S. at 365.[13]

There are other factors that provide additional support for concluding that the search was reasonable. First, the search was conducted pursuant to a statute that authorized it. See *Burger*, *supra*; *Biswell*, *supra*. Second, petitioner expressly agreed to the search condition authorizing the search in order to secure his release from prison. See note 4, *supra*. Third, the search took place on a public street, not in the parolee's home with its heightened constitutional protections.

Finally, as crafted by the California legislature and interpreted by the judiciary, the parole condition does not authorize searches that are arbitrary or capricious or for purposes of harassment; the searches may not be motivated by factors unrelated to rehabilitation or protection of public safety and they must be conducted in a reasonable manner. *Reyes*, 968 P.2d at 450-451. With these protections against abuse in place, the absence of individualized suspicion should not tip the balance that

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[13] In *Knights* this Court found that it is "reasonable to conclude that the search condition would further the two primary goals of probation —rehabilitation and protecting society from future criminal violations." 534 U.S. at 119. That finding applies equally to the similar parole search condition here. See Part A(3), *supra*.

the *Knights* Court found weighs in favor of the State's interest in protecting public safety.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted.

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JANUARY 2006

04-9728

NOV 2 3 2005

IN THE

Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

—v.—

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COUI T OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF NORTHERN CALIFORNIA IN SUPPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT.....2

ARGUMENT 5

I. The Special Needs Doctrine Does Not Apply To A Parole Search Conducted For General Criminal Law Enforcement.....5

A. The Special Needs Doctrine Is A Narrow Exception To Fourth Amendment Warrant And Probable-Cause Requirements 7

B. The Suspicionless Search Of A Parolee By A Police Officer Engaged In Ordinary Law Enforement Is Not A Special Need.....13

II. The Fourth Amendment Requires Individualized Reasonable Suspicion For Discretionary Searches Of Particular Parolees 20

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Almeida-Sanchez v. United States,
413 U.S. 266 (1973) 21, 23

Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) ..... *passim*

Camara v. Mun. Court,
387 U.S. 523 (1967) 8,10,21,25

Carroll v. United States,
267 U.S. 132 (1925) 19

Chandler v. Miller, 520 U.S. 305 (1997) 10

City of Indianapolis v. Edmond,
531 U.S. 32 (2000) ..... *passim*

Delaware v. Prouse, 440 U.S. 648 (1979) ..... *passim*

Ferguson v. City of Charleston,
532 U.S. 67 (2001) ..... *passim*

Griffin v. Wisconsin, 483 U.S. 868 (1987) ..... *passim*

Marshall v. Barlow's, Inc.,
436 U.S. 307 (1978) 25

Mich. Dep't of State Police v. Sitz,
496 U.S. 444 (1990) 11, 14, 21, 24

Michigan v. Tyler, 436 U.S. 499 (1978) 10

Minnesota v. Dickerson, 508 U.S. 366 (1993) 5

Morrissey v. Brewer, 408 U.S. 471 (1972) 6, 7

Nat'l Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989) ..... *passim*

New Jersey v. T.L.O.,
469 U.S. 325 (1985) ..... *passim*

New York v. Burger, 482 U.S. 691 (1987) 10

O'Connor v. Ortega, 480 U.S. 709 (1987) ..... *passim*

Pa. Bd. of Probation & Parole v. Scott,
524 U.S. 357 (1998) 17

Skinner v. Ry. Labor Executives' Ass'n,
489 U.S. 602 (1989) ..... *passim*

Terry v. Ohio, 392 U.S. 1 (1968) 5

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 20, 21, 23

United States v. Knights, 534 U.S. 112 (2001)..... *passim*

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) ..... *passim*

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995) 8, 11, 20, 22

Whren v. United States, 517 U.S. 806 (1996) 10

Regulations

49 C.F.R. § 219.201(a)(1)-(3) (1987) 22

Other Authorities

William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 1501-02, 1507-08 (1990) (unpublished Ph.D. Dissertation, Claremont Graduate School) 8

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Northern California is one of its regional affiliates. Since its founding in 1920, the protection of Fourth Amendment rights has been a central concern of the ACLU, which has appeared before this Court in numerous Fourth Amendment cases, both as direct counsel and as *amicus curiae*. Of particular note, the ACLU has served as direct counsel in several of the cases delineating the scope of the "special needs" exception to the usual Fourth Amendment standards, including *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Because this case addresses an important Fourth Amendment question, its proper resolution and the proper application of the special needs doctrine are matters of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE

On September 6, 2002, San Bruno police officer Alex Rohleder was driving his patrol vehicle when he happened upon Petitioner Donald Curtis Samson, Petitioner's friend Deborah Watson, and Watson's three-year-old son Jefferson as they

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[1] Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person other than *amici*, their members or counsel, made any monetary contribution to the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk of the Court.

walked down the street. Joint Appendix 10, 31, 53 (henceforth "J.A."). Officer Rohleder recognized Petitioner from a prior contact. J.A. 32, 35. Officer Rohleder knew that Petitioner was on parole and believed that he "might have a parolee at large warrant." J.A. 32. He frisked Petitioner for weapons and found none. J.A. 55. Officer Rohleder asked Petitioner if he had an outstanding warrant, and Petitioner stated that he had already resolved the warrant and that "he was in good standing with his parole agent." J.A. 32. Officer Rohleder called the matter in and confirmed that this was correct. J.A. 33. Nevertheless, he searched Petitioner a second time more thoroughly. J.A. 33, 38. Officer Rohleder searched Petitioner solely because he was on parole. J.A. 10, 38. Officer Rohleder admitted that he had no other reason to search Petitioner, who posed no threat to officer safety. J.A. 40.

When asked whether he searches all parolees with whom he makes contact, Officer Rohleder testified: "It depends." J.A. 39. He explained: "[i]f I drive by one and I already dealt with him earlier in the day or have dealt with him, I just drive by. I have other work to do. I don't go after everybody all the time." *Id.* During his search of Petitioner, Officer Rohleder discovered a cigarette pack containing a "plastic baggy" of methamphetamine. J.A. 33. He then arrested Petitioner. J.A. 11.

Petitioner was on parole on the day Officer Rohleder searched and arrested him. J.A. 47. His notice of conditions of parole stated: "You've agreed to search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause." J.A. 48.

SUMMARY OF ARGUMENT

Rather than repeat arguments made elsewhere, this brief focuses on the history of the special needs exception to ordinary

Fourth Amendment rules and the reasons this exception does not apply to the suspicionless and discretionary search of parolees by law enforcement officers. *Amici* agree with Petitioner that the search in this case cannot be upheld if traditional Fourth Amendment rules are applied, but do not directly address that issue in this brief.

Under the Fourth Amendment, a search generally is reasonable only if it is supported by some level of individualized suspicion, usually requiring probable cause and a warrant. Special needs justifying departure from the normal warrant and probable-cause requirements arise only in exceptional circumstances that extend "beyond the normal need for law enforcement" and that "make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (citation and quotation marks omitted). Those circumstances do not exist here. Pursuant to California's standard parole search condition permitting suspicionless law enforcement searches, Officer Rohleder searched Petitioner solely because he was a parolee. As an ordinary police officer conducting an ordinary search, Officer Rohleder should be held to ordinary Fourth Amendment standards.

This Court's decisions in *Edmond*, *Griffin*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and *United States v. Knights*, 534 U.S. 112 (2001), make clear that the line separating special needs searches from regular Fourth Amendment searches lies in the programmatic purpose and character of the search. If the search is conducted for a general law enforcement purpose, then it must satisfy the traditional balancing test in order to be constitutional. The special needs exception only includes those searches conducted for administrative or non-prosecutorial purposes. In that limited context, this Court has allowed an exception to the probable-cause and warrant requirement based on its view that the probable-cause standard "is peculiarly related to criminal investigations," *Earls*, 536 U.S. at 828 (citation and internal quotation marks omitted).

Thus, in *Griffin*, this Court described the supervisory search of a probationer as a special need. This Court did not hold that every search of a probationer – or, in this case, a parolee – qualified under the special needs doctrine. Any ambiguity in that regard was resolved in *Knights*, where this Court applied traditional Fourth Amendment rules in reviewing a police officer's search of a probationer for law enforcement purposes. Officer Rohleder's search of Petitioner was not a supervisory search; it was a law enforcement search. *Ferguson*, *Edmond*, *Griffin*, and *Knights* together command that a police officer's search of a parolee for law enforcement purposes does not fall within the special needs exception and must be examined under the usual Fourth Amendment balancing test.

Even assuming *arguendo* that parolee searches are considered a special need, the search here violated the Fourth Amendment because it was based on a complete absence of suspicion. This Court has held, in an unbroken line of precedent, that a completely suspicionless search cannot rest on the discretion of an individual officer; the search must be even-handed and programmatic. Accordingly, officers have only two choices: they may single out particular individuals for a search if they have individualized reasonable suspicion, or they may search individuals without reasonable suspicion, but only if the search policy is applied uniformly. The California parole search condition contains no standards to limit discretion; its permissive language expressly contemplates searches at any time, for any purpose, with or without cause. Unsurprisingly, then, Officer Rohleder neither applied the search policy even-handedly nor had reasonable suspicion to search Petitioner – instead, he searched Petitioner for no better reason than that he could. This Court should not break from its long line of precedent by upholding a general search based on nothing but a police officer's whim.

ARGUMENT

I. The Special Needs Doctrine Does Not Apply To A Parole Search Conducted For General Criminal Law Enforcement

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend IV. A police officer's command to stop and produce for inspection a privately held, concealed package, the officer's inspection of the interior of the package, and the decision to take custody of the contents of that package as evidence in support of a criminal charge constitute, collectively, both a search and a seizure. *See generally Terry v. Ohio*, 392 U.S. 1 (1968); *Minnesota v. Dickerson*, 508 U.S. 366 (1993). The general rule requires that to be reasonable, and thus constitutional, a search must be based on individualized suspicion of wrongdoing. This Court has recognized a limited exception to that rule, however, for searches based on "special needs, beyond the normal need for law enforcement, mak[ing] the warrant and probable-cause requirement impracticable." *Griffin*, 483 U.S. at 873 (citation and internal quotation marks omitted); *see also Ferguson*, 532 U.S. at 74 n.7; *Edmond*, 531 U.S. at 37.

In *Griffin*, this Court found that "[s]upervision . . . is a 'special need' of the State," 483 U.S. at 875, "justify[ing] replacement of the standard of probable cause by reasonable grounds" when probation officials conduct searches to assess compliance with probation terms, *id.* at 876 (internal quotation marks omitted). In *Edmond* and *Ferguson*, by contrast, this Court rejected application of the special needs exception, where "the central and indispensable feature of the policy from its inception was the [involvement] of law enforcement," *Ferguson*, 532 U.S. at 80, and the pursuit of law enforcement ends. *See also Edmond*, 531 U.S. at 38, 41, 44. Most recently, in *Knights*, this Court upheld a search of a probationer by a police officer, not because the special needs exception applied,

but because the search was deemed reasonable based upon the existence of individualized suspicion that the probationer had committed a crime. *Knights*, 534 U.S. at 117-18, 121-22.

As explained below, the invocation of the special needs exception has always been premised upon a clear separation of the nature and programmatic purpose of a search from general law enforcement goals, requiring the government to justify a law enforcement search under ordinary Fourth Amendment rules of warrants, probable cause, and overall reasonableness. The status of the person being searched – in this case, a person on parole – may well have implications for that reasonableness analysis, but that status alone cannot convert an ordinary police search into a special need. To so find would make the special needs exception so broad as to swallow the rule of Fourth Amendment reasonableness, opening the door to standardless police searches of any member of a societal group having diminished or attenuated privacy expectations.[2] This Court's ruling in *Knights* declined to apply the special needs doctrine to a police officer's search of a California probationer, and the same framework must apply to the substantially similar search at issue in this case.[3]

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[2] As discussed in more detail below, many of this Court's special needs decisions involve groups of individuals who, like parolees in California, are subject to various forms of scrutiny. These groups include high school students, employees in regulated industries, and certain government employees. In none of these cases did this Court signal a willingness to allow police searches of anyone at any time, but rather constructed a careful balancing test, evaluating the precise governmental interest – an interest that was found, in each case, to exist apart from law enforcement.

[3] This case involves a parolee, whereas *Griffin* and *Knights* involved probationers, but probationers and parolees have been treated similarly under the Fourth Amendment. Probationers and parolees are alike in that they do not have "the absolute liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey v. Brewer*, 408 U.S. 471, 480

A. The Special Needs Doctrine Is A Narrow Exception To Fourth Amendment Warrant And Probable-Cause Requirements

From its inception, "the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband by officers of the Crown." *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985). The present case offers a remarkable parallel to this foundational "evil": an officer of the state invokes a general power to search individuals without any particularized suspicion toward the person being searched or even the belief that a crime has been committed. If a prototypical case for Fourth Amendment limitations exists, it is this law enforcement officer trolling for evidence of a crime, searching individuals who are suspected of no wrongdoing, in the hope that some evidence of criminality might be exposed.

Fourth Amendment analysis begins with the strong presumption that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Edmond*, 531 U.S. at 37 (citation omitted). Exceptions to this fundamental rule are closely guarded, made in the "limited circumstances . . . where the program [i]s designed to serve special needs, beyond the normal need for law enforcement." *Id.* (citations and internal quotation marks omitted). A long and consistent pedigree attaches to the judicial insistence upon cabining the special needs doctrine, reaching only those searches made for some reason *other than law enforcement*. A finding that law enforcement concerns are

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(1972); *see also Griffin*, 483 U.S. at 874 (applying the conditional liberty concept to probationers). Since the search condition at issue in *Knights* is substantially the same as the search condition at issue here, the line drawn by *Griffin* and *Knights* between special needs cases and ordinary Fourth Amendment cases applies to parolees in the same way that it applies to probationers.

sufficiently absent to justify the special need exception turns on some combination of the nature of the search and the relationship between the government actor and the person being searched, leading to a circumscribed list of contexts in which the need for individualized suspicion is either lowered or eliminated.

1. Where a government search is based on legitimate regulatory or administrative concerns unrelated to criminal law enforcement, this Court has been willing to dispense with the traditional probable-cause and warrant requirements when it appears those requirements are either unnecessary or impractical. As this Court has explained, "the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions" where the government is not seeking evidence of criminal activity but is instead seeking "to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (internal citations omitted).[4] For instance, in looking for faulty wiring in a building, the notion of individualized suspicion is of no relevance to a government inspector. *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967). The point of the inspection is building safety, not "discovery of evidence of crime." *Id.* In a similar vein, efforts to discover drug and

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[4] The historical context for adopting the Fourth Amendment comports with the contemporary countenance of suspicionless searches for purely administrative purposes. Specifically, during the ratification era, a number of states permitted warrantless inspections of commercial enterprises pursuant to regulatory objectives, and federal law authorized limited warrantless commercial searches for tax collection and customs purposes. *See* William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 1501-02, 1507-08 (1990) (unpublished Ph.D. Dissertation, Claremont Graduate School), *cited in Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor J., dissenting) (describing Cuddihy's work as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken.").

alcohol use among employees grow from a desire to foster a safe workplace. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 628-29 (1989); *Von Raab*, 489 U.S. at 674; *see also Earls*, 536 U.S. at 836 (stating that "the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy.").

Under this Court's cases, the concepts of probable cause and reasonable suspicion have been deemed "rooted . . . in the criminal investigatory context," and the Court has therefore concluded that "it is difficult to give [those concepts] . . . much meaning" in the context of searches conducted for administrative or non-prosecutorial purposes, *O'Connor v. Ortega*, 480 U.S. 709, 723 (1987). In contrast, a search conducted for law enforcement purposes can be expected, and should be required, to "generate articulable grounds for searching any particular person or place." *Von Raab*, 489 U.S. at 668.

2. The finding of a special need can turn, as well, upon the fact that the person performing a search has little or no connection to law enforcement, both demonstrating that the search does not serve law enforcement ends, but also recognizing the reality that most government employees are ill-equipped to assess the existence of probable cause. Railroad supervisors, for instance, "are not in the business of investigating violations of the criminal laws" and "otherwise have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence." *Skinner*, 489 U.S. at 623. Similarly, this Court has found that "[i]mposing unwieldy warrant procedures . . . upon [government office] supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable." *O'Connor*, 480 U.S. at 722. On the same basis, this Court has seen fit to "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause" when they suspect that a student has violated school rules. *T.L.O.*, 469 U.S. at 343.

Unlike railroad supervisors, office managers, and school teachers, police officers are trained to detect violations of the law: their central job responsibilities require the ability to recognize suspicious behavior and investigate potential crimes. Thus, it is not at all "difficult" to give "meaning" to the concept of probable cause in the context of a parolee search whose purpose is "criminal investigat[ion]." *O'Connor*, 480 U.S. at 723.

3. "While reasonableness under the Fourth Amendment is predominantly an objective inquiry," this Court's "special needs and administrative search cases demonstrate that purpose is often relevant" to the special needs analysis. *Edmond*, 531 U.S. at 47.[5] The finding of a special need apart from law enforcement has led this Court regularly to examine programmatic purposes and to specify the nature of the governmental interest.

In *Camara*, 387 U.S. at 535, the special need arose from the observation that "[t]he primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety." This Court recognized the special need of hospital officials in *O'Connor*, 480 U.S. at 721, "to enter the offices and desks of . . . employees for legitimate work-related reasons wholly unrelated to illegal conduct. Employers and supervisors are focused primarily on the need to complete the government agency's work in a prompt and efficient manner." Similarly,

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[5] The rule against inquiry into an officer's *subjective* reasons for conducting a particular search, as articulated in *Whren v. United States*, 517 U.S. 806 (1996), "does not preclude an inquiry into programmatic purpose" where "relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." *Edmond*, 531 U.S. at 45-46 (citing *Chandler v. Miller*, 520 U.S. 305 (1997); *Von Raab*; *New York v. Burger*, 482 U.S. 691 (1987); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Camara v. Mun. Court, 387 U.S. 523 (1967)*).

the need for swift and informal discipline in schools justified the finding of a special need in *T.L.O.*, 469 U.S. at 340.

In this Court's four cases upholding suspicionless drug testing, a special need arose from concerns about workplace or school safety, as opposed to general law enforcement. *See Earls*, 536 U.S. at 834 (school drug testing based on the governmental concern with "[t]he drug abuse problem among our Nation's youth"); *Vernonia*, 515 U.S. at 661-62 (same); *Von Raab*, 489 U.S. at 666 (purpose of drug testing Customs Service employees is "to deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions"); *Skinner*, 489 U.S. at 631 (recognizing the "Government's goal of ensuring safety in rail transportation").

Significantly, each of these cases involved an announced policy authorizing designated government officials, who were not police officers, to conduct a limited search for specified reasons that were articulated in advance and unrelated to general law enforcement.[6] Whether the programmatic purpose was building safety, workplace efficiency, or school discipline, this Court was able, in each case, to identify and describe that purpose in terms clearly distinct from ordinary enforcement of criminal laws.

Accordingly, this Court has carefully noted the lack of a law enforcement purpose in cases approving a special need. The school district policy approved in *Earls* "[wa]s not in any way related to the conduct of criminal investigations." 536 U.S. at 829. *See also Vernonia*, 515 U.S. at 658 n.2 (suspicionless drug testing of student athletes is "*non*punitive" and distinct

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[6] The need to articulate a government purpose unrelated to criminal law enforcement becomes even more important when the search is conducted by police officers normally charged with investigating crime. *Cf. Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (sobriety checkpoint program conducted by state police for purpose of highway safety, not general law enforcement).

from "evidentiary" searches); *Von Raab*, 489 U.S. at 666 ("It is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent."); *Skinner*, 489 U.S. at 620-21 ("The FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.") (citation and internal quotation marks omitted); *T.L.O.*, 469 U.S. at 341 n.7 (limiting its holding to "searches carried out by school authorities acting alone and on their own authority" and expressly withholding opinion on "the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies").

4. By contrast, this Court has found the special needs exception inapplicable when the purpose of a search or seizure is not "one divorced from the State's general interest in law enforcement." *Ferguson*, 532 U.S. at 79. Significant for the analysis of the present case, this Court noted in *Ferguson* that "[i]n none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes," *id.* at 83 n.20, which is plainly what occurred here. "Without drawing the line at [searches] designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." *Edmond*, 531 U.S. at 42.

Since law enforcement officers developed and implemented the drug-testing policy in *Ferguson*, 532 U.S. at 82 ("throughout the development and application of the policy, the Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy"), for law enforcement purposes, *id.* at 80 ("the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance

abuse treatment"), abandonment of Fourth Amendment requirements could not be justified through the special needs exception, *id.* at 84.

Likewise, because the Indianapolis Police Department created and operated the checkpoint program in *Edmond*, 531 U.S. at 34-36, and "the . . . program unquestionably ha[d] the primary purpose of interdicting illegal narcotics," *id.* at 40-41, such stops could "only be justified by some quantum of individualized suspicion," *id.* at 47. This Court emphasized that:

> We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. . . . each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.

Id. at 41-42.

B. The Suspicionless Search Of A Parolee By A Police Officer Engaged In Ordinary Law Enforcement Is Not A Special Need

Petitioner's suspicionless search by a police officer engaged in ordinary law enforcement cannot be justified as a special need under this Court's decisions. In *Griffin*, this Court held that supervision of probationers, when conducted by a

probation officer,[7] is a special need justifying departure from the usual probable-cause and warrant requirements. 483 U.S. at 873-75. As in its other special needs cases, this Court tethered its decision to the nature of the search, the relationship between the government actor and the person being searched, and the programmatic purpose of the search. *Id.* at 873-79.

In *Knights*, this Court reaffirmed the *Griffin* rule but declined to extend the special needs exception where a probationer was searched by an ordinary police officer for the purpose of gathering evidence in a criminal investigation. 534 U.S. at 117-18. The decision to apply ordinary Fourth Amendment standards (that is, the decision to forego invocation of the special needs exception) in *Knights* controls the analysis in the present case: the search and seizure of Petitioner Samson was of a similar nature, was performed by a comparable officer, and had an identical programmatic purpose, as explained in detail below.

1. In *Griffin*, this Court found a special need because every relevant characteristic of the probation regulation at issue in that case – the nature of the governmental interest, the relationship between the probation officer and the probationers, and the programmatic purpose of the search – centered on supervision of probationers. As this Court noted, the overall objectives of the probation system (and likewise, the parole system) are to rehabilitate probationers and protect the community. *Griffin*, 483 U.S. at 875. "These . . . goals require and justify the exercise of supervision to assure that the [probation] restrictions are in fact observed." *Id.* Like the checkpoint programs upheld in *Sitz* and *United States v.*

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[7] Two probation officers conducted the search, but three police officers accompanied them. *Griffin*, 483 U.S. at 871. Since the police officers only assisted in what was otherwise a probation officer-led supervisory search, this Court characterized the search as "carried out entirely by the probation officers under the authority of Wisconsin's probation regulation." *Id.*

Martinez-Fuerte, 428 U.S. 543 (1976), the safety-related nature of the governmental interest is not criminal investigation – even though those who violate probation, like those who violate laws against drunk driving and smuggling of aliens, may ultimately be arrested and prosecuted. Supervision of probationers is thus a special need going "beyond the normal need for law enforcement." *Griffin*, 483 U.S. at 874.

Furthermore, as in *O'Connor* and *T.L.O.*, the "not, or at least not entirely, adversarial" relationship "between the object of the search and the decisionmaker" was an additional factor in this Court's finding of a special need in *Griffin*. *Id.* at 879. Although a probation officer has a stronger connection to law enforcement than hospital officials (in *O'Connor*) and teachers (in *T.L.O.*), "neither is he the police officer who normally conducts searches against the ordinary citizen." *Id.* at 876. Special needs permitting departure from the usual warrant and probable-cause requirements exist only where such requirements are "impracticable." *Id.* at 873, 876. According to this Court, the warrant requirement would "interfere" with the operation of the probation system because "a magistrate rather than the probation officer [becomes] the judge of how close a supervision the probationer requires," *id.* at 876, and the probable-cause requirement would disrupt the "ongoing supervisory relationship" between the probationer and his or her probation officer, *id.* at 879. Given the probation officer's unique relationship with the probationer, this Court concluded in *Griffin* that it would be "destructive of the whole object of the continuing probation relationship to insist upon" probable cause instead of reasonable grounds in this context. *Id.*

In determining that the programmatic purpose of the Wisconsin probation search regulation was supervisory and non-prosecutorial, this Court began with the language of the regulation itself, *id.* at 870-71, and the needs of "the probation agency," *id.* at 879, rather than the subjective purpose of the probation officers who searched Griffin's home. Since probation officers conducted the search of Griffin's home

pursuant to a regulation whose programmatic purpose was "beyond normal law enforcement," *id.* at 874, and the goal of the search was to assess whether Griffin violated his probation by possessing a firearm, *id.* at 871, 875, the search was sufficiently supervisory in nature to fall within the closely guarded category of special needs, *id.* at 874.

2. *Knights* answers the question left open by *Griffin*, making clear that a police officer's routine search of a probationer (or, by implication, a parolee) must be evaluated under the usual Fourth Amendment balancing test. In *Knights*, a detective investigating acts of vandalism searched Knights's home based on reasonable suspicion that he was involved in those crimes. 534 U.S. at 114-15. This Court stressed that *Griffin*'s "special needs holding made it unnecessary to consider whether warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment," *id.* at 117-18 (citation and internal quotation marks omitted), but declined to apply the special needs exception, deciding the case instead on the basis that a probationer search based on reasonable suspicion was valid under the Fourth Amendment, *id.* at 118. That *Griffin* involved a search "carried out entirely by . . . probation officers" for the purpose of supervising the probationer to ensure his compliance with the terms of his probation, *Griffin*, 483 U.S. at 871, whereas *Knights* involved a search carried out by a police officer for the purpose of investigating ordinary criminal activity, *Knights*, 534 U.S. at 115, proved to be the critical distinction that removed the probationer search from the special needs framework. The nature of the search (detecting crime), the identity of the government official (a police officer), and the lack of any programmatic purpose apart from criminal law enforcement placed *Knights* outside the long line of special needs cases. *See* discussion *supra* Section I.A.

3. *Griffin* and *Knights* are opposite sides of the same coin: searches conducted for supervisory purposes count as special needs justifying departure from Fourth Amendment

safeguards; conversely, searches conducted for general law enforcement purposes must satisfy the traditional balancing test.

The search of Petitioner Samson lacked the essential elements that led this Court in *Griffin* to invoke the special needs exception. Unlike the probation officer search in *Griffin*, a police officer on routine patrol searched Petitioner. Officer Rohleder knew that Petitioner was on parole (just as the police officer in *Knights* knew the probation status of Mr. Knights), but this mere knowledge did nothing to create a supervisory relationship and thus failed to place the police officer in a position to judge "how close a supervision," *Griffin*, 483 U.S. at 876, Petitioner required as a parolee. Unlike a supervising parole officer, Officer Rohleder did not "proceed on the basis of [his] entire experience" with Petitioner or "assess probabilities in the light of [his] knowledge of [Petitioner's] life, character, and circumstances." *Id.* at 879. He did not assess probabilities at all, because his sole reason for searching Petitioner was the fact that he was on parole. J.A. 10, 38. Officer Rohleder is precisely the ordinary police officer whom this Court has distinguished from parole agents conducting parole searches. *See Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 369 (1998) ("Parole agents, in contrast to police officers, are not engaged in the often competitive enterprise of ferreting out crime; instead, their primary concern is whether their parolees should remain free on parole.") (internal citation and quotation marks omitted).

Just as this Court in *Griffin* thoroughly examined the nature of the Wisconsin probation system to ensure that it was truly supervisory and did not merely conclude from the fact that Griffin was a probationer that the search of his home was a special need, this Court should not conclude that Petitioner's mere status as a parolee converts every search into a special needs search.

4. The California parole search condition to which Petitioner was subject is substantially the same as the probation

search condition at issue in *Knights*.[8] Here, as in *Knights*, an ordinary police officer conducted the search as part of his daily routine of investigating and detecting crime.[9] The search condition does not require police officers to "have in mind the welfare of the [parolee]," or "[p]rovid[e] individualized counseling designed to foster growth and development of the client." *Griffin*, 483 U.S. at 876 (citation and quotation marks omitted). Just as this Court treated the search in *Knights* as being outside the special needs exception, the same analysis should apply here.

If a search condition that allows any peace officer to search a parolee at any time, with or without cause, is not for the purpose of general law enforcement, it is difficult to imagine what would be. Pursuant to this blank check, Officer Rohleder carried out the search not because he suspected Petitioner of any wrongdoing, either in terms of violating the terms of his parole or being guilty of any crime, but merely because he could. *See* J.A. 38. The Fourth Amendment was enacted precisely to protect against this kind of general search for evidence of a crime without any reason to believe that the individual is guilty of any wrongdoing. Just as this Court has

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[8] The search condition in *Knights* stated that Knights would "[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." 534 U.S. at 114 (internal quotation marks omitted). The search condition at issue here states: "You've agreed to search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause." J.A. 4.

[9] The police officer in *Knights* had specific reason to believe that Knights was guilty of the particular crime, while the officer in the present case lacked even that level of suspicion. Officer Rohleder searched Petitioner because he "just happened to run across him," J.A. 34. As discussed *infra* at Section II, this search suffers the infirmity, not just of being for law enforcement purposes, but also of trolling broadly to try to *find* evidence of crime.

not "sanction[ed] stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime," *Edmond*, 531 U.S. at 44, it should not sanction a police officer's suspicionless search of a parolee simply to make sure that "he had nothing on him illegal," J.A. 44. No exigent circumstances accompanied the search in this case that would distinguish it "from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction." *Edmond*, 531 U.S. at 44; *see also Carroll v. United States*, 267 U.S. 132, 153-54 (1925) ("It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.").

While the ultimate goal of the California search condition may be to facilitate the supervision and rehabilitation of parolees, the immediate programmatic purpose highlighted in this case is to allow general searches for evidence of wrongdoing – as shown by Officer Rohleder's investigatory search. This is a far cry from the Wisconsin probation search regulation this Court approved in *Griffin*, which specifically authorized supervisory searches carried out by probation officers. 483 U.S. at 870-71. "Because law enforcement involvement always serves some broader social purpose or objective," describing the purpose of a search at too high a level of generality would result in "virtually any nonconsensual suspicionless search [being] immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose." *Ferguson*, 532 U.S. at 84. This Court has been willing to relax the Fourth Amendment's warrant and probable-cause requirements only when the search is not part of a general enterprise of criminal investigation: "The special needs cases we have decided do not sustain the active use of law enforcement, including arrest and

prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives." *Id.* at 88 (Kennedy, J., concurring). The Court should not change course now.

II. The Fourth Amendment Requires Individualized Reasonable Suspicion For Discretionary Searches Of Particular Parolees

Assuming *argue do* that the present case were viewed as fitting within the special needs exception, the search would nonetheless be unreasonable because Officer Rohleder acted with unfettered discretion and in the absence of any individualized suspicion. While individualized suspicion may not be an "irreducible requirement" of the Fourth Amendment, *Earls*, 536 U.S. at 829 (quoting *Martinez-Fuerte*, 428 U.S. at 561), it is still the rule rather than the exception. This Court has never permitted a search focused on a single individual without at least reasonable suspicion, and a contrary holding that a police officer could single out a particular parolee on a discretionary, non-random basis for a suspicionless search would allow the exception to swallow the rule.[10]

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[10] This Court has reached a consistent result in every special needs case, permitting officer discretion for searches only upon some level of individualized suspicion. *Compare Griffin*, 483 U.S. at 872 (probation officers searched probationer's apartment with reasonable grounds to believe he violated his probation); *O'Connor*, 480 U.S. at 712-13 (hospital personnel searched doctor's office with suspicion to believe he improperly managed the hospital's residency program); *T.L.O.*, 469 U.S. at 329-30 (assistant vice principal searched student's purse with reasonable suspicion to believe it contained cigarettes); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (roving patrol stops must be based on reasonable suspicion of violation of license and registration laws); and *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (same for immigration violation), *with Vernonia*, 515 U.S. at 650 (no suspicion required for drug testing policy applied to all student athletes); *Earls*, 526 U.S. at 826 (same for extracurricular activity participants); *Skinner*, 489 U.S. at 608 (same for all covered employees specified by statute); *Von*

Under the California search condition, individual peace officers determine entirely for themselves if, when, where, and how they will search a particular parolee; "[t]his kind of standardless and unconstrained discretion is the evil this Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Prouse*, 440 U.S. at 661 (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *Camara*, 387 U.S. at 532-33). As this Court emphasized in striking down suspicionless stops performed at the discretion of individual officers, "the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government." *Brignoni-Ponce*, 422 U.S. at 822. This Court's steadfast concern with unlimited discretion manifests itself in the requirement that if an officer does not have individualized suspicion to search a particular person, he must search either everyone or no one in a given group.

The California search condition violates the rule against standardless discretion underlying this long line of cases: it provides neither an individualized suspicion requirement for searching specific parolees nor a uniform, non-discretionary manner of searching all parolees without suspicion. Officer Rohleder singled out Petitioner for a search not because of any suspicion of wrongdoing, but because he merely felt like searching him that day. What California permits is far beyond anything this Court has ever upheld, either as part of the special needs doctrine or otherwise.

1. Where this Court has upheld suspicionless searches based on special needs, government officers had little or no

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Raab, 489 U.S. at 660-61 (same for all employees in drug interdiction or firearm-carrying positions); *Martinez-Fuerte*, 428 U.S. at 559 (no suspicion required for seizures of motorists at fixed immigration checkpoints); and *Sitz*, 496 U.S. at 454 (same for fixed sobriety checkpoints).

discretion to pick and choose who to search. The student and employee drug testing cases illustrate this point quite well. In *Vernonia* and *Earls*, school officials subjected all students participating in athletics and extracurricular activities, respectively, to drug tests on a uniform basis. *Vernonia*, 515 U.S. at 650 (school tested all athletes at the beginning of their sport season and randomly tested ten percent of the athletes each week during the season); *Earls*, 526 U.S. at 826 (school tested all students engaging in extracurricular activities before participation and randomly during participation). In fact, the drug-testing policy in *Earls* specifically did not permit the school to single out individual students unless there was reasonable suspicion of drug use. *Earls*, 526 U.S. at 826. The California search condition gives a blank check to police officers to conduct searches at their will; this flies in the face of this Court's emphasis on the importance of minimizing the ability of officials to exercise discretion in an arbitrary manner. *See, e.g., Vernonia*, 515 U.S. at 663 (expressing concern over "the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students.").

Similarly, this Court upheld the drug-testing policies in *Skinner* and *Von Raab* in part because employers uniformly imposed drug tests on a certain defined group of employees, rather than imposing drug tests on an ad hoc basis. *Skinner*, 489 U.S. at 609, 633 (Federal Railroad Administration required railroads to drug test all employees involved in an accident); *Von Raab*, 489 U.S. at 660-61 (Customs Service drug tested all employees seeking to be placed in positions involving drug interdiction and carrying of firearms). In *Skinner*, one subpart of the Federal Railroad Administration regulations mandated testing for all covered employees under three circumstances: following a "major train accident," an "impact accident," and "[a]ny train incident that involves a fatality to any on-duty railroad employee." 489 U.S. at 609 (quoting 49 C.F.R. § 219.201(a)(1)-(3) (1987)). Unlike the California parole search condition, this subpart of the regulations contained little room

for the exercise of discretion. *Id.* at 609 n.2. Another subpart of the regulations permitted railroads to single out particular employees for drug testing, but only if a supervisor had reasonable suspicion that the employee's acts contributed to an accident or certain rule violations. *Id.* at 611. While this subpart of the regulations "confer[red] some discretion to choose those who may be required to submit to testing, [it] also impose[d] specific constraints on the exercise of that discretion." *Id.* at 622 n.6.

2. This Court has applied a similarly strict standard to motorist stops, allowing suspicionless searches and seizures only where officers faced constraints over their discretion in selecting whom they would stop. The contrast between this Court's analysis (and the results) in *Brignoni-Ponce*, 422 U.S. at 882-83, and *Martinez-Fuerte*, 428 U.S. at 559, is telling. Both cases concerned seizures of motorists in order to detect illegal immigration, a purpose sufficiently removed from ordinary law enforcement to permit seizures without probable cause or a warrant. *See Brignoni-Ponce*, 422 U.S. at 878-80; *Martinez-Fuerte*, 428 U.S. at 551-53. Yet, in the former, this Court was "unwilling to let the Border Patrol dispense entirely with the requirement that officers must have reasonable suspicion to justify roving-patrol stops," *Brignoni-Ponce*, 422 U.S. at 882, because "a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference," *id.* at 883. *See also Almeida-Sanchez*, 413 U.S. at 268 (rejecting as unreasonable the Border Patrol's asserted "extravagant license to search" automobiles by roving patrol "without a warrant," "without probable cause to believe the cars contain aliens," and without consent). By contrast, this Court upheld fixed immigration checkpoints because "field officers may stop only those cars passing the checkpoint, [so] there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." *Martinez-Fuerte*, 428 U.S. at 559.

This Court applied the same reasoning in examining police stops removed from the border. In both *Sitz* and *Prouse*, the primary purpose for the stops was to ensure highway safety (apprehending drunk drivers and unlicensed drivers)—a purpose that was sufficiently divorced from the general interest in law enforcement. *See Sitz*, 496 U.S. at 451; *Prouse*, 440 U.S. at 658-59. Nevertheless, this Court struck down the roving patrols employed in *Prouse* because "[t]he marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle to a seizure . . . at the unbridled discretion of law enforcement officials." 440 U.S. at 661. In *Sitz*, this Court upheld the fixed sobriety checkpoint program partly on the ground that "this case" does not involve "a challenge to random highway stops," as *Prouse* did. 496 U.S. at 454. Instead, the sobriety checkpoints were "selected pursuant to [established] guidelines, and uniformed police officers stop[ped] every approaching vehicle"; therefore, "the intrusion . . . [wa]s for constitutional purposes indistinguishable from the checkpoint stops . . . upheld in *Martinez-Fuerte*." *Id.* at 453.[11]

Like the patrolman in *Prouse* who "decided to pull [the motorist] off" the road merely because he "saw the car in the area and wasn't answering any complaints," 440 U.S. at 650-51 (internal quotation marks omitted), Officer Rohleder does not search all parolees "all the time," but only if he has no "other work to do" or has not already "dealt with" the parolee. J.A. 39. In other words, he searches parolees whenever he feels like it. This Court's reasoning in *Prouse* is highly applicable here:

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[11] Similarly, in *Edmond*, written directives instructed officers that they "must conduct each stop in the same manner" and gave them "no discretion to stop any vehicle out of sequence." 531 U.S. at 35. However, as discussed *supra* Section I.A, the primary law enforcement purpose of the *Edmond* checkpoints puts them outside the special needs exception.

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations – or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered – we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.

440 U.S. at 661.

3. The California search condition imposes no specific constraints on the exercise of an officer's discretion to search parolees. *Cf. Von Raab*, 489 U.S. at 667 (the Customs Service "does not make a discretionary determination to search based on a judgment that certain conditions are present"). Under the search condition, "[t]he process" for searching a parolee is not "automatic," like the process for drug testing a Customs Service employee "pursu[ing] a covered position." *Id.* A search is not "undertaken pursuant to previously specified 'neutral criteria.'" *Prouse*, 440 U.S. at 662 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978)). No regulations or standards curb the "discretion of the official in the field" to use the search condition as an excuse to search any particular parolee. *Camara*, 387 U.S. at 532. These searches are not "established" or carried out in a "regularized manner" that provides "visible evidence, reassuring to law-abiding [citizens], that the [searches] are duly authorized and believed to serve the public interest." *Martinez-Fuerte*, 428 U.S. at 559. Unlike the suspicionless searches and seizures approved in special needs and checkpoint cases, officers acting pursuant to the California search condition do not automatically search all parolees upon the occurrence of certain predetermined events (such as applying for a safety-sensitive employment position or joining an athletic team). These searches do not have to be conducted

in an even-handed manner – as Officer Rohleder's search of Petitioner certainly illustrates.

If there is one rule governing this Court's special needs jurisprudence, it is that government officers cannot have free reign to search whomever they choose, whenever they choose, for whatever reason they choose. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions . . . ." *Prouse*, 440 U.S. at 653-54 (citations and internal quotation marks omitted). California has only two options: either require individualized reasonable suspicion for the search of a particular parolee or search all parolees on a uniform and non-discretionary basis without suspicion. Since the California parole search condition falls into neither category, it is unconstitutional.

CONCLUSION

For the reasons stated, the judgment of the California Court of Appeal should be reversed.

Respectfully submitted, [12]

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[12] *Amici* wish to acknowledge the contributions of Elizabeth C. Wang in writing this brief.

Supreme Court, U.S.
FILED
NOV 2 8 2005
OFFICE OF THE CLERK

No. 04-9728

In the
Supreme Court of the United States

October Term, 2005

DONALD CURTIS SAMSON,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

BRIEF AMICI CURIAE of AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE and THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF RESPONDENT.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

BRIEF OF *AMICI CURIAE* 1

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT

THE FOURTH AMENDMENT DOES NOT PROHIBIT A LAW ENFORCEMENT OFFICER FROM CONDUCTING A WARRANTLESS SEARCH OF A PAROLEE WHEN THERE IS NO SUSPICION OF CRIMINAL WRONGDOING, AND THE SOLE REASON FOR THE SEARCH IS THAT THE PERSON IS ON PAROLE. 4

CONCLUSION 9

TABLE OF AUTHORITIES

Cases **Page**

Ewing v. California, 538 U.S. 11 (2003) 5
Griffin v. Wisconsin, 487 U.S. 868 (1987) 6
Penn. Bd. of Prob. and Parole v. Scott, 524 U.S. 357 (1998) 6
People v. Reyes, 19 Cal. 4th 743, 80 Cal.Rptr.2d 734, 968 P.2d 445 (1998) 6
People v. Samson, 2004 Cal.App. Unpub. LEXIS 9304, 2004 WL 2307111 (Cal.App. 1 Dist. 2004) 4
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 7
Terry v. Ohio, 392 U.S. 1 (1968) 6
United States v. Knights, 534 U.S. 112 (2001) 6

Constitution

U.S. Const. Amend. IV ..... *passim*

Record of Suppression Hearing

Record at Pages 21-22 3
Record at Page 28 3
Record at Page 34 3
Record at Page 36 3

Reports and Periodicals

Glaze and Palla, PROBATION AND PAROLE IN THE UNITED STATES, 2004 (NCJ-210676), Bureau of Justice Statistics, Department of Justice, available at: www.ojp.usdoj.gov/bjs/abstract/ppus04.htm 5
Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C.L. Rev. 255 (2004) 5, 6, 7

BRIEF OF *AMICI CURIAE*

This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.[1]

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc., (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amici* by James P. Manak, Esq., counsel of record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc. made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world. Founded in 1893, the IACP, with more than 20,000 members in 101 countries, is the world's oldest and largest association of police executives. IACP's mission, throughout the history of the association, has been to identify, address and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of interacting with and overseeing the activities of parolees; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of training and policy on the subject.

Because of the relationship with our members and the composition of our membership and directors, including active law enforcement administrators and counsel, we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

STATEMENT OF THE CASE

A police officer saw the petitioner walking down a street with a woman and baby. He recognized petitioner from a prior contact involving an arrest for an "incident" with petitioner's girlfriend. He also knew that petitioner was on parole. At the time of the prior contact petitioner had said the "police weren't going to take me back to prison." Suppression Hearing (S.H.) 34.

Being "under the impression that he might have a parolee at large warrant," the officer asked to speak with petitioner. He asked him if a parole warrant was outstanding against him. Petitioner replied that "he had already taken care of it. And he was released from custody." S.H. 21-22.

The officer radioed his dispatcher and was told that petitioner was on parole but that the warrant was no longer outstanding. The officer then searched petitioner for the stated reason that "it's a condition of his parole. I believe that being [a] parolee, that he needs to make sure he's still obeying the laws." S.H. 28. The officer added that if a "parolee or person [is] subject to [a] search and seizure [condition], I would search them. . . ." S.H. 36.

The petitioner was under a condition of parole whereby he had agreed to be subject to search and seizure by a parole officer or police officer at any time of the night or day, with or without a search warrant and with or without cause. This type of condition is automatic in the State of California for parolees. The condition in question is common in many states.

As a result of the search the officer found a cigarette box in petitioner's pocket which contained a plastic baggie holding methamphetamine and petitioner was placed under arrest. His motion to suppress the evidence was denied and he was

convicted and sentenced to prison, based on this conviction and a prior felony conviction.

The conviction was affirmed by the California Court of Appeal, *People v. Samson*, 2004 Cal.App. Unpub. LEXIS 9304, 2004 WL 2307111 (Cal.App. 1 Dist. 2004) and further review was denied by the Supreme Court of California. (Cal. 2005).

SUMMARY OF ARGUMENT

Amici take the position that the conduct of the law enforcement officer in this case was proper under the Fourth Amendment. We submit that as a matter of law and sound policy, parolees should be subject to warrantless searches without reasonable suspicion so long as these searches are not arbitrary, capricious or done in a harassing manner.

Speaking from our unique experience in the criminal justice system involving day-to-day contact with parolees, we submit that this is necessary for the rehabilitation of parolees, the protection of the public, and the protection of law enforcement officers who interact with parolees.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT PROHIBIT A LAW ENFORCEMENT OFFICER FROM CONDUCTING A WARRANTLESS SEARCH OF A PAROLEE WHEN THERE IS NO SUSPICION OF CRIMINAL WRONGDOING, AND THE SOLE REASON FOR THE SEARCH IS THAT THE PERSON IS ON PAROLE.

Amici will not repeat the legal arguments put forward by the respondent in this case; we do, however, support them.

As national representatives of law enforcement officers, administrators and legal advisors, we wish to inform the Court

of the following policy considerations from our professional perspective:

- Recidivism rates for ex-offenders are very high, a fact recognized by this Court in *Ewing v. California*, 538 U.S. 11, 26 (2003). In fact,

  > [T]he majority of ex-offenders released from prison reoffend. [A] study of recidivism conducted by the Bureau of Justice Statistics showed that eleven states accounted for 57% of all state prison releases in 1983. Of those prisoners released in 1983, 63% were rearrested at least once for a felony or serious misdemeanor.

  Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C.L. Rev. 255, at 259 (2004).
  In the report, Glaze and Palla, PROBATION AND PAROLE IN THE UNITED STATES, 2004 (NCJ-210676), compiled by the federal Bureau of Justice Statistics, Department of Justice, the overall success rate for parolees was only 46% in 2004.

- There is a pressing societal and law enforcement need for close and effective supervision and surveillance of parolees. As noted by Thompson:

  > The problem posed by inmates being released from prison and struggling to make successful transitions is not science fiction. Nor is it new. What is new, though, is the scale of the current problem. The United States has commenced the largest multi-year discharge of prisoners from state and federal custody in history. This release is a direct consequence of the explosion in incarceration that this country endorsed and experienced over the last two decades.

  Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C.L. Rev. 255, at 256 (2004).

- Law enforcement officers—including parole officers—are in the best position to conduct surveillance and evaluative activities on paroleees.

- Given the unique position of such officers the broadest possible investigative powers must be given to them, consistent with constitutional limitations. The Court has recognized this in cases such as: *Griffin v. Wisconsin*, 487 U.S. 868 (1987); *Penn. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357 (1998) (*amici* filed a brief in *Scott* taking the position that the exclusionary rule is not applicable in parole revocation proceedings); and *United States v. Knights*, 534 U.S. 112 (2001).

- States such as California have recognized this need and have by statute given officers the right to search parolees without cause. This has been approved by the Supreme Court of California without a *Terry v. Ohio*, 392 U.S. 1 (1968), threshold requirement of reasonable suspicion. *People v. Reyes*, 19 Cal. 4th 743, 80 Cal.Rptr.2d 734, 968 P.2d 445 (1998).

- Using a balancing of interests test and considering the special status of parolees, *amici* submit that such a procedure comports with the Fourth Amendment.

- The procedure additionally serves the purpose of protecting the public and law enforcement officers in their interaction with parolees.

- The procedure also promotes the rehabilitation of parolees and aids in their reintegration into society by assuring that parolees do not engage in illegal conduct and therefore do not recidivate. As noted by Thompson, ". . . Individuals placed on parole generally must be released to the county where they resided before incarceration. Thus, offenders overwhelmingly return to poor, geographically isolated,

inner-city neighborhoods." Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C.L. Rev. 255, at 267 (2004).

- And finally, such a procedure comports with this Court's precedent in Fourth Amendment consent and waiver jurisprudence. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

- Convicted persons have only a statutory right to parole, a right that is discretionary with parole authorities. Parole authorities traditionally condition this grant of privilege upon restrictions and terms that parolees agree to. One of those conditions is an agreement that parolees submit to searches. While these conditions vary in detail from state-to-state, they are in the nature of a contract between the state and the parolee.

- As noted, in the context of the Fourth Amendment a search condition constitutes a consent to search, a waiver by the parolee of a warrant, probable cause and reasonable suspicion. From the parolee's point of view the waiver of rights in a reasonable step to achieving a limited degree of freedom; from the states' point of view the waiver is necessary to effectively carry out programs of supervision and rehabilitation of the parolee. The parolee has the special status of being, in effect, a prisoner with the privilege of limited freedom outside the walls of prison. With that privilege goes a host of restrictions, rules, limitations, restraints and supervision.

- Such waiver of rights, however, does not include the Fourth Amendment requirement of reasonableness. California has prudently recognized this by requiring suspicionless searches of parolees to be conducted in such a manner as to not be arbitrary, capricious or constitute harassment. This is a fact-bound element of the Fourth Amendment reasonableness requirement and both the trial court and the

appellate court reached the conclusion that the search in this case *was* reasonable, *i.e.*, not arbitrary, capricious or conducted in a harassing manner.[2]

Based on these considerations *amici* submit that the search in question was: (1) necessary to achieve the legitimate objectives of the state; (2) appropriate under a balancing of interests of the state and the parolee; (3) protective of the safety of the public and law enforcement officers; (4) effective in promoting the goals of the parole system; and (5) faithful to the Fourth Amendment jurisprudence of this Court concerning consent, waiver and reasonableness. We ask the Court to affirm the decision of the court below, and in so doing, clarify this area of Fourth Amendment jurisprudence for law enforcement administrators and officers.

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[2] Law enforcement administrators and officers are mindful of their relations with the community and *amici* do not advocate as a practice the questioning of individuals as to whether they are on probation or parole without articulable reason to do so.

CONCLUSION

Amici urge this Court to uphold the constitutionality of the law enforcement conduct involved in this case on the law and as a matter of sound judicial policy.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 2 8 2005
OFFICE OF THE CLERK

No. 04-9728

IN THE
Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND THE PUBLIC DEFENDER OF VENTURA COUNTY, CALIFORNIA, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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November 28, 2005

QUESTION PRESENTED

Does the Fourth Amendment prohibit police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI* 2

STATEMENT 3

1. The historical facts fully and fairly present the question. 3

2. California has a complex system of county and state probation and parole, in which many persons have search terms, but many do not. Law enforcement seeks Fourth Amendment rules that are understandable and easy to apply on the streets, but find none 4

SUMMARY OF THE ARGUMENT 8

ARGUMENT 9

I. California's Fourth Amendment jurisprudence has been misguided since its 1994 decision in *In re Tyrell J.* Inspired by "sloppy analysis," its 1998 decision in *People v. Reyes* extends the "special needs" exception to full-scale searches conducted in the course of ordinary law enforcement 9

II. A "special needs" balancing of interests dictates that law enforcement searches of parolees be based upon some quantum of individualized suspicion. A proper balance is struck with a requirement that such searches be based upon reasonable suspicion, the lowest objective standard known under the law.....13

a. California's interests in monitoring and supervising parolees are legitimate and significant.....14

b. The searches by officers in the field are frequent, unlimited, full-scale searches and the evidence seized is often used in new felony prosecutions. Parolees, and those persons in propinquity to them, are detained, inconvenienced, and embarrassed.....15

c. Use of the familiar "reasonable suspicion" standard is a practical alternative. It allows an immediate, forceful response to any appearance of misconduct. The state's interests are not placed in jeopardy by a requirement of individualized suspicion.....16

III. Any regulatory program which includes suspicionless searches of parolees or probationers must be free of pervasive entanglement with ordinary law enforcement.....18

CONCLUSION.....20

TABLE OF AUTHORITIES

CONSTITUTION:

Fourth Amendment.....passim

CASES:

California v. Trombetta, 467 U.S. 479 (1984).....2
Delaware v. Prouse, 440 U.S. 648 (1979).....14
In re Tyrell J., 8 Cal.4th 68 (1994).....9, 10, 11, 13
In re William R., 133 Cal.App.4th 1004 (2005).....11
In re Joshua J., 129 Cal.App.4th 359 (2005).....11
Lockyer v. Andrade, 538 US 63 (2003).....3
Maryland v. Buie, 494 U.S. 325 (1990).....17
Monge v. California, 524 U.S. 721 (1998).....2
People v. Burgener, 41 Cal.3d 505 (1986).....11
People v. Lewis, 74 Cal.App.4th 662 (1999).....6
People v. Revelles, B180419 [nonpub opn] (2005).....11
People v. Reyes, 19 Cal.4th 743 (1998).....9, 11, 12
People v. Robles, 23 Cal.4th 789 (2000).....13
People v. Sanders, 31 Cal. 4th 318 (2003).....11, 13
People ex rel. Deputy Sheriffs' Assn. v. County of Santa Clara, 49 Cal.App.4th 1471 (1996).....6
Richards v. Wisconsin, 520 US 385 (1997).....17
Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) 12, 18
Treasury Employees v. Von Raab, 489 U.S. 656 (1989).....12, 18
United States v. Knights, 534 U.S. 112 (2001).....2
Vernonia Sch. Dist. 47j v. Acton, 515 U.S. 646 (1995)....16

STATUTES & REGULATIONS:

Calif. Bus. & Prof. Code, §6070, subd. (b).....2
Calif. Pen. Code, § 1210, subd. (a).....6
Calif. Pen. Code, § 3000 (a) (1).....14
Calif. Pen. Code, §§ 3074-3088.....5

Calif. Pen. Code, § 3076, subd. (c).....6
Calif. Pen. Code, § 3081, subd. (a).....6

MISCELLANEOUS:

Rules of the Supreme Court of the United States, Rule 37.6.....2
Substance Abuse and Crime Prevention Act of 2000.....6, 15
Trends in Probation and Parole in the States, William D. Burrell, American Probation and Parole Association.....15

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INTEREST OF *AMICI*

In an attempt to assist the Court and to bring to its attention facts and analysis which have not already been presented by the parties, we respectfully submit this *amici curiae* brief. [1]

With over 3,000 members, the California Public Defenders Association (CPDA) is the state's largest association of criminal defense attorneys. CPDA has been a national leader in continuing legal education for defense attorneys for over 26 years, and is one of only two organizations deemed by California to be an "automatically" approved legal education provider. (Calif. Bus. & Prof. Code, §6070, subd. (b).) CPDA attracts many private practitioners as associate members. CPDA's members are involved in both trial and appellate practice. Many of CPDA's clients are on parole or probation, or both. The California courts have granted CPDA leave to appear as *amicus curiae* in well over 30 California cases which culminated in published opinions. CPDA has also served as *amicus curiae* in the United State Supreme Court in cases involving constitutional issues in criminal procedure. (See *California v. Trombetta*, 467 U.S. 479 (1984) [the duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense]; *Monge v. California*, 524 U.S. 721 (1998) [the double jeopardy clause does not bar retrial of a prior conviction allegation after an appellate finding of evidentiary insufficiency]; *United States v. Knights*, 534

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[1] Pursuant to Rule 37.6, counsel of record Michael C. McMahon states that he is the sole author of this *amici curiae* brief and specifically that no counsel for a party authored this brief either in whole or in part, and that no person or entity other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

U.S. 112 (2001) [a probation search based up reasonable suspicion did not violate the Fourth Amendment]; *Lockyer v. Andrade*, 538 US 63 (2003)[a state court's affirmance of a sentence challenged as cruel and unusual was not objectively unreasonable].)

The second *amicus* on the brief, the Public Defender of Ventura County, California, with his fifty deputies, provides legal representation to thousands of clients each year, who are being prosecuted in the criminal courts. Many of his clients are on parole or probation, or both. The Public Defender's staff has read thousands of arrest reports describing California parole and probation searches and has brought suppression motions challenging them as unreasonable. The Public Defender has an accurate impression of the true nature and extent of these privacy intrusions. He understands the question presented and the scope of its presentation.

Both the California Public Defenders Association and the Public Defender of Ventura County have a substantial interest in the correct resolution of the question presented in this case. Its resolution will determine the rights of our clients and affect our practice. We believe our brief can augment those presented by the parties and illuminate the history and nature of the current controversy.

STATEMENT

1. The historical facts fully and fairly present the question.

Pedestrian, Donald Samson, who was not suspected of any wrongdoing, was fully-searched by a police officer for the sole reason that he was on parole. The officer found methamphetamine and Samson was convicted of possessing the drug. The California courts

rejected Samson's argument that the suspicionless search violated the Fourth Amendment.

These facts present a "clean" record for the resolution of the question presented. Nothing suggests that certiorari was improvidently granted or that the resolution of the question should await some future case.

2. California has a complex system of county and state probation and parole, in which many persons have search terms, but many do not. Law enforcement seeks Fourth Amendment rules that are understandable and easy to apply on the streets, but find none.

Petitioner's brief will contain an excellent overview of the California "state parole" system. *Amici* wish to augment that overview with a description of California's "county parole" system.

California has 58 counties. Although Samson was on state parole, rather than county parole, it is important for the Court to understand that California residents may be on county probation, on county parole, or on a state parole imposed by California, by sister state, or by the federal system. Some of these persons have a diminished expectation of privacy as a result of the terms and conditions of their probation or parole, while many do not. If the particular probation or parole includes no search term, the warrant and probable cause requirements fully apply. As a result, it is not enough for a law enforcement officer to know that a person is on probation or parole. The officer must also know whether the particular probation or parole includes a search term, and the wording of that search term. As always, the "devil is in the details."

In the instant case, the officer who searched Samson may not have understood the difference between

the rights of a state parolee and a state prisoner. The officer appears to have believed that Samson was a state prisoner who had been released from prison "early," on parole. The officer testified that he could search Samson, or other state parolees, without any individualized suspicion because, *"It's a privilege for him to be out there."* J.A. 38. In fact, persons released from California prisons and placed on state parole have already served their entire prison term. Their freedom from custody is not a privilege, but a matter of right. They have "paid their debt to society," and are transitioning to post-prison life. The parole period is an additional period of supervision tacked on to the underlying prison sentence by the operation of state law.

By contrast, persons on county parole have been released early from service of a commitment to county jail. Their parole is completely unrelated to the state prison system. There is, in each California county, a Board of Parole Commissioners. "County parole" is granted pursuant to California Penal Code sections 3074-3088 by those boards. Many of these parolees do not have "search terms" and none are required by law. The only legal requirement is that county parolees must be supervised by a county parole officer. Id., at §3088.

County parole is a "critical" component of the California justice system in every county. "The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for a county to provide for the supervision of parolees, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge." (*Id.*, at §3074, emphasis added.)

County parole is often used to relieve overcrowding in California's numerous jails which are operated by a

county government. California county sheriffs commonly seek to release inmates on county parole to alleviate jail crowding, including inmates the county probation officer might view as unsuitable for county parole. *People ex rel. Deputy Sheriffs' Assn. v. County of Santa Clara,* 49 Cal.App.4th 1471, 1485-1486 (1996) Other persons are placed on county parole as a reward for good work and behavior while in jail, or pressing family needs and emergencies.

The distinction between county and state parole is significant. When California appellate courts state that "every parolee" has a search term, this is inaccurate with regard to the many persons on county parole. See e.g. *People* v. *Lewis,* 74 Cal.App.4th 662, 668 (1999) (in California search conditions "are now automatic, and imposed on every parolee").

The fact that any particular parolee might be on county parole should be common knowledge in the California public safety community. Every judge and every jail inmate is provided with detailed information regarding county parole. Calif. Penal Code §3076, subd. (c). County parole may be imposed for as long as two years following release from the county jail. *Id.*, §3081, subd. (a).

Recent developments have added to the complexity of California's system of probation and parole. The Substance Abuse and Crime Prevention Act of 2000 (SACPA), which was enacted by the voters of California, requires courts to order probation and community-based drug treatment, rather than incarceration, for certain criminal offenders who commit nonviolent drug possession offenses. Calif. Pen. Code, § 1210, subd. (a). The SACPA also mandates that *state parolees* who pick up a new criminal prosecution for a non-violent drug offense not involving sales, may be entitled to a treatment-oriented *county probation* if they are convicted. Such persons are simultaneously supervised by a state

parole officer, a county probation officer, and treatment providers. This organized program of supervision will routinely include random drug-testing, pursuant to the supervisors' protocols. Reasonable estimates are that approximately 10% of persons entering this new drug treatment-based county probation are already on state parole. And, subject to certain narrow exceptions, state parole may not be suspended or revoked for commission of a nonviolent drug possession offense or for violating any drug-related condition of parole.

The sheer complexity of California's system of state parole, and county probation and parole, presents a problematic situation for the peace officer on the street and those charged with the task of training them on Fourth Amendment principles. In which situations must a search be based upon probable cause? When is reasonable suspicion sufficient?

California's courts have added to this confusion by assuring officers that all parolees may be searched without any quantum of individualized suspicion. If this is true, may a county probationer (or at least one with a search term) also be searched at the whim of the officer?

California looks to this Court for much needed guidance.

SUMMARY OF THE ARGUMENT

A constitutional program of parole supervision might include a component of random breath, blood, and urine testing, inspections of the residences of parolees, and other privacy intrusions, which are not based upon individualized suspicion.

Currently, California has no incentive to develop such a program. A series of flawed opinions from the California Supreme Court has left the authorities with the impression that parolees have a diminished expectation of privacy, one that has been diminished into oblivion. Parolees have become fair game for full-scale searches by any officer of any law enforcement agency, without limitation. Any evidence seized in those searches is most often used in new felony prosecutions.

Although the entire, standardless scheme is arbitrary and capricious, California courts promise to suppress the evidence only if the parolee can prove *the particular search* was arbitrary, capricious, or undertaken for harassment. A search undertaken merely because the person is a parolee will not result in suppression. As a practical matter, this safeguard is illusory.

A balancing of interests dictates that ordinary law enforcement searches of parolees should be based upon some quantum of individualized suspicion. A requirement of reasonable suspicion, at least for searches conducted by officers in the field, is constitutionally appropriate. Parole supervision and public safety will not suffer in any significant degree from such a requirement. Law enforcement will actually benefit by a return of their attention to subjects who appear suspicious.

The judgment of the California Court of Appeal should be reversed.

ARGUMENT

I. California's Fourth Amendment jurisprudence has been misguided since its 1994 decision in *In re Tyrell J.* Inspired by "sloppy analysis," its 1998 decision in *People v. Reyes* extends the "special needs" exception to full-scale searches conducted in the course of ordinary law enforcement.

Amici contend that California's jurisprudence regarding searches of probationers and parolees strayed far off course eleven years ago. The court's failure to acknowledge and rectify that mistake has hampered its analysis in more recent cases. Law enforcement, privacy rights, and public safety have all suffered.

In 1994, the California Supreme Court concluded that an officer may search a minor who is subject to a probation search condition without reasonable suspicion that the minor has violated the law or any condition of the probation *even if the searching officer is unaware of the suspect's probationary status. In re Tyrell J.*, 8 Cal.4th 68, 78 (1994) (*Tyrell J.*).

In *Tyrell J.*, a police officer had searched the person of a juvenile without knowing the minor was on juvenile probation with a search condition, and found a bag of marijuana in one of his pockets.

But not every appellate victory for the prosecution proves to be a real benefit for law enforcement. *Tyrell J.* was wrongly decided and misled law enforcement officers, prosecutors, and judges, regarding traditional Fourth Amendment principles. *Tyrell J.* meant that a search could be justified based upon facts learned *after* the search was completed.

The methodology used to arrive at the result in *Tyrell J.* was flawed. The majority opinion in *Tyrell J.* determined that the search was not a violation of the

Fourth Amendment by considering "the primary purpose of the Fourth Amendment exclusionary rule." *Id.*, at p. 89.

The question of whether the search of the minor's pocket violated his Fourth Amendment rights should properly have been resolved before (or at least separately from) any discussion of whether the exclusionary sanction was appropriate in that context. The two questions are inherently separate issues, each requiring separate analysis.[2] While it is entirely possible the California court might have arrived at the same result without confusing the two issues, the court's flawed analysis creates serious doubts regarding its ultimate conclusion.

For the past eleven years, the California criminal justice system has suffered as a result of this decision. Many law enforcement officers have applied the rationale of *Tyrell J.* to searches of adults who may later be discovered to be on either probation or parole. *Tyrell J.* encourages law enforcement to search first and ask questions later. When questions do precede the search, the first question is invariably, *"Are any of you on probation or parole."* By this diversion of police attention from the observation of facts which might support an inference of suspicion of wrongdoing, the quality and character of criminal investigation has suffered.

Despite controversy, confusion, and criticism, the California Supreme Court has declined to frankly overrule its decision in *Tyrell J.* See, most recently, in

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[2] If the search of Samson was unreasonable, the exclusionary rule should apply because the evidence was used to obtain a criminal conviction. Any further discussion of the deterrent purpose of the exclusionary rule is both unnecessary and unhelpful in determining whether the search was unreasonable.

People v. Sanders 31 Cal.4th 318, 335, fn. 5 (2003) (*Sanders*).

A few days before the writing of this brief, the California Supreme Court let stand a decision by the Court of Appeal upholding a search undertaken solely because the officer knew that the subject was on "parole." At the time of the search, the officer did not know whether the person he was searching was on a California state parole with a search term, or on a grant of parole from another agency which did not include a search term. *People v. Revelles*,. B180419, [nonpub. opn] (review den., November 16, 2005, S137742.) Although an order denying review creates no precedent, the Court of Appeal's underlying decision on the merits shows the lingering effects of the *Tyrell J.* approach: the use of information learned only after a search, to establish its constitutionality. Despite the erosion of *Tyrell J.* in the *Sanders* decision, the California courts remain confused. Compare *In re William R.*, 133 Cal.App.4th 1004 (10/27/2005) [*Sanders* did not overrule *Tyrell J.*] with *In re Joshua J.*, 129 Cal.App.4th 359 (5/12/2005) [*Sanders* "dismantled the foundation and cornerstones of *Tyrell J.*" so that "there is no presently binding Supreme Court authority" on the issue].

In 1998, the California Supreme Court was confronted with the same question presented to this Court in the instant case. In *People v. Reyes*, 19 Cal.4th 743 (1998) (*Reyes*) a four-to-three majority of the California Supreme Court overruled *People v. Burgener*, 41 Cal.3d 505 (1986) in which it had held that any warrantless search of a parolee must be justified by a reasonable suspicion that the parolee has violated, or is planning to violate, the law or a parole condition. *Reyes*, at pp. 746, 753-754. The *Reyes* majority held that "a parole search may be reasonable despite the absence of particularized suspicion." *Id.* at p. 753.

In *Reyes*, the California Supreme Court relied upon two cases from this Court to justify the suspicionless searches of parolees by officers in the field. But its reliance on these cases is misplaced.

In *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), the design of the United States Customs Service's urine testing program was clearly separate and distinct from the ordinary needs of law enforcement:

- The results of the tests could not be used in a criminal prosecution of the employee without the employee's consent. *Id.*, at p. 666, and,
- Testing was not subject to the discretion of officials in the field. *Id.*, at p. 667.

In the instant case, Samson, a state parolee, was searched in an exercise of unfettered discretion by a city police officer in the field. The seized evidence was used in a criminal prosecution of Samson without his consent. Neither of these important distinctions was discussed by the California court.

The second case cited by the *Reyes* court was *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) *Skinner* is readily distinguishable, however, because there:

- the privacy interests implicated by the searches were "minimal" and the searches were limited to blood, breath, and urine workplace testing of employees performing safety-sensitive tasks, and,
- the employees were already subject to medical and physical fitness examinations.

In the instant case, the searches at issue are full-scale searches far more diverse and intrusive than the blood, breath, and urine testing presented in *Skinner*.

The state parolees are not otherwise subject to the medical and physical fitness examinations, as were the railway employees.

The California court has persisted in conflating the initial question of whether the Fourth Amendment has been violated, with the secondary question of whether application of the exclusionary rule is an appropriate sanction for the violation. See e.g. *People v. Robles,* 23 Cal.4th 789, 799-800 (2000); *Sanders, supra,* 31 Cal.4th at pp. 324, 334; and conc. opn., J. Brown, at p. 340, complaining of the recurring "sloppy analysis."

This case presents the High Court with an opportunity to provide the California Supreme Court with some needed guidance and free it from the muddled thinking exhibited in *Tyrell J.* and its progeny. *Amici* hope that this guidance will restore the attention of law enforcement upon the observation of specific and articulable facts supporting an inference of suspicion of misconduct. The limited resources of the police can then be re-focused on those who appear to be involved in wrongdoing, rather than scattered among thousands of law-abiding persons, who happen to be on probation or parole. *Amici* contend that public safety will not suffer by the restoration of traditional Fourth Amendment principles.

II. A "special needs" balancing of interests dictates that law enforcement searches of parolees should be based upon some quantum of individualized suspicion. A proper balance is struck with a requirement that such searches be based upon reasonable suspicion, the lowest objective standard known under the law.

"[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion

on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

Amici suggest that the balancing of interests here dictates that law enforcement searches of parolees should be based upon reasonable suspicion, the lowest objective standard known under the law.

II a. California's interests in monitoring and supervising parolees are legitimate and significant.

The government's interests in monitoring and supervising parolees are great. California has articulated those interests in some detail. One interest is the "successful reintegration of the offender into society and ...positive citizenship." Cal. Pen. Code, § 3000(a)(1). Others are the "supervision of and surveillance of parolees" and "to assist parolees in the transition between imprisonment and discharge...." *Id.*

Parolees have been convicted of at least one crime and are at risk of re-offending. In the instant case, Mr. Samson was in possession of some two grams of a methamphetamine. This was a new violation of law and of the conditions of parole. It is likely, however, that most suspicionless parole searches produce nothing more than humiliation and delay for those parolees who have remained "above suspicion." (The courts never see those cases, because no arrest is made nor charges filed. They are nevertheless, a part of the intrusion upon privacy interests which must go onto the other end of the balancing scale.)

The state's interest in supervising parolees is similar to its interest in supervising probationers. As explained earlier, many people are simultaneously on both parole and probation, and, the lines between the two have been blurred.

The creation of different rules of reasonableness governing parole and probation searches may or may not be appropriate. That is a question that need not be decided in the instant case. But searches of both parolees and probationers which, as is often the case, result in the discovery of small quantities of drugs will often *not* result in a revocation of that parole or probation under California's Substance Abuse and Crime Prevention Act of 2000.

However, California law enforcement officers are well aware that such evidence may be used in the prosecution of a new criminal case. Under California law, such new offenses are invariably filed as felonies, rather than misdemeanors, particularly where the defendant is already on probation or parole.

Under current policies, the state's legitimate interests are great, but are virtually identical to its general interest in ordinary law enforcement.

II b. The searches by officers in the field are frequent, unlimited, full-scale searches and the evidence seized is often used in new felony prosecutions. Parolees, and those persons in propinquity to them, are detained, inconvenienced, and embarrassed.

The parole searches at issue are full scale searches. Parole (and probation) search intrusions are far more than minimal. At the end of 2003, some 4.8 million adults were on probation and parole, compared with approximately 2.1 million adults in jail or prison. See *Trends in Probation and Parole in the States*, William D. Burrell, American Probation and Parole Association. These searches directly or indirectly affect the rights of those persons associated in some way with the parolee.

The parole searches include searches of homes shared with friends and family, cars shared with co-

workers, searches conducted in full public view, searches following transport to a police station, body cavity searches, and blood draws for drug and alcohol testing. The searches infringe upon the rights of non-parolees. For example, if a car driven by a parolee is stopped for a search, all of the passengers are also effectively stopped and detained.

Currently, California's parole searches are of unlimited intrusiveness. This weighs heavily in the balancing process, when compared to the "negligible" privacy-related significance of school urine sampling conducted with a discreet protocol. *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 658 (1995).

Given the extremely intrusive nature of the parole searches and the use of the seized evidence in new criminal prosecutions, *amici* contend that the invasion of privacy rights is significant.

II c. Use of the familiar "reasonable suspicion" standard is a practical alternative. It allows an immediate, forceful response to any appearance of misconduct. The state's interests are not placed in jeopardy by a requirement of individualized suspicion.

Searches based upon reasonable suspicion are a practical alternative to suspicionless searches. Parolees will soon learn that if they conduct themselves in a law-abiding manner and remain free of ambiguous conduct or suspicious situations, they will not be hassled or subject to arbitrary searches, at least not by law enforcement officers with no nexus with parole supervision. The very purpose of parole is to encourage just such good behavior.

Use of a reasonable suspicion standard actively encourages compliance with both the letter and the spirit of parole regulations. Although the warrant and probable-cause requirement is impracticable in the

context of parole supervision, a requirement of reasonable suspicion is not, at least not when the searches are conducted by ordinary law enforcement as opposed to an independent parole supervision program.

Although some argue that suspicionless searches of parolees and probationers promote public safety, this premise should commence, rather than conclude, our analysis.

This Court has refused to approve routine privacy intrusions in other contexts where officer safety was the legitimate governmental interest sought to be promoted. See *Maryland v. Buie*, 494 U.S. 325 (1990) (rejecting the state's claim that a protective sweep of a home is valid without reasonable suspicion when the area may contain someone who is a threat to the police; a protective sweep of a home is permissible only where there is reasonable suspicion that the area to be swept harbors an individual posing a danger to those on the arrest scene); see also *Richards v. Wisconsin*, 520 US 385 (1997) (rejecting a blanket rule permitting police to effectuate an unannounced entry of a home whenever they possess a search warrant for narcotics).

Constitutional rights often mean that government may not pursue it interests in the most economical and efficient manner. The reasonable way of doing business is not always the fastest or the least expensive. The Framers surely must have appreciated that protecting these rights would often create some resulting inconvenience, some delay, or some additional costs.

When performing a balancing of interests, the Court cannot discard the right to individual privacy merely because protecting it may result in some inconvenience to the government's legitimate pursuit of other interests.

Can the Court fairly conclude that requiring individualized suspicion for searches of parolees by law

enforcement would have a significantly detrimental effect on their supervision or would it render their supervision impracticable?

Amici contend that the important governmental interests furthered by the parole searches will not be placed in jeopardy by a requirement of individualized suspicion.

III. Any regulatory program which includes suspicionless searches of parolees or probationers should be free of pervasive entanglement with ordinary law enforcement.

Conceivably, the California legislature and parole authorities could develop a reasonable, structured, program to monitor and supervise parolees, which included a component of suspicionless searches.

Such a program might include a component of random breath, blood, and urine testing, inspections of the residences of parolees, and other privacy intrusions, which are not based upon individualized suspicion. Such a program would need to be less arbitrary and capricious than the current unstructured policy, which leaves everything to the unfettered discretion of every law enforcement officer in the field.

A constitutional program would need to look much more like the structured programs at issue in *Treasury Employees v. Von Raab, supra,* or *Skinner v. Railway Labor Executives' Ass'n., supra.* Neither of those programs was designed so as to create a pervasive entanglement with ordinary law enforcement. In those programs, the primary consequences of the searches were not new criminal prosecutions. In those programs, the decision to search was not made by a law enforcement officer in the field. In those programs, the searches were limited in scope. The privacy invasions were minimal.

California needs a new, well-conceived program for parole searches. But the state will have no incentive to develop such a program until this Court clarifies that California's current policy is unreasonable.

Finally, *amici* believe that any attempt to design a program of suspicionless searches for parolees should be left, in the first instance, to state authorities. This Court will have the last word; it need not have the first.

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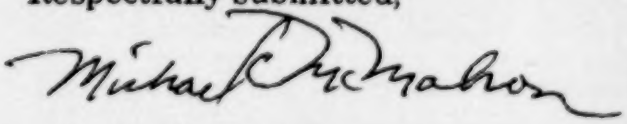
CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted,



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November 28, 2005

(9)

No. 04-9728

Supreme Court, U.S.
FILED
NOV 2 0 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONALD CURTIS SAMSON,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the California Court of Appeal, First Appellate District

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BRIEF OF *AMICUS CURIAE* CITIZENS UNITED FOR REHABILITATION OF ERRANTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing, and the sole reason for the search is that the person is on parole?

TABLE OF CONTENTS

	Page
Question Presented	i
Interest Of Amicus	1
Summary Of Argument	2
Argument	3
I. Modern Criminology Has Identified The Crucial Process Of Desistance From Criminal Behavior As The Key To An Offender's Successful Reentry Into Society, And This Process Of Desistance Is Undermined By The Random Police Searches Of Parolees That The California Courts Have Adopted	3
II. Denial Of All Fourth Amendment Rights To Parolees Undermines The Trust In The Fairness Of The Criminal Justice System Modern Social Science Has Demonstrated To Be Vital To Inducing A Normative Willingness To Comply With The Law	7
Conclusion	9

TABLE OF AUTHORITIES

Page

CASES

Morrissey v. *Brewer*, 408 U.S. 471 (1972) 5

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Page

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BRIEF OF AMICUS CURIAE CITIZENS UNITED FOR REHABILITATION OF ERRANTS IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

Amicus Curiae Citizens United for Rehabilitation of Errants ("CURE") is a non-profit membership organization of families of prisoners, former prisoners and other concerned citizens.[1] CURE's mission is to assist former offend-

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[1] This *amicus* brief is filed with the consent of the parties, and letters of consent are being filed with the Clerk of the Court in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amicus* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in

ers in their reentry into society, to provide them all the rehabilitative opportunities they need to turn their lives around, and to enhance public awareness of the rights and needs of former prisoners as they embark on the path toward law-abiding lives and careers. Through a national network of state chapters, CURE is involved in promoting enlightened state and federal legislation on a multitude of issues concerning reform in prison, probation, and parole.

This case concerns whether a State may, consistent with the Fourth Amendment, subject parolees to suspicionless searches at any time. Subjecting parolees to such searches thwarts rehabilitation by undermining the parolee's ability to adopt the prospective attitude of a law-abiding citizen. Rehabilitation requires the parolee to conceive of himself as a responsible citizen. But suspicionless searches link the parolee to his criminal past, randomly subjecting him to an indignity and intrusion that is both characteristic of prison life and wholly at odds with being a responsible citizen. Amicus CURE has an interest in ensuring that the parolees are not subjected to such random searches and other indignities that undermine CURE's mission of rehabilitation.

SUMMARY OF ARGUMENT

The unquestionable goal of parole, to serve as a transition for the former offender to a law-abiding life, is thwarted by an unregulated police power to subject the former offender to random searches. The process of achieving desistance from criminal behavior requires that the parolee adopt a prospective attitude of law-abidingness, reflected in a self-chosen identity as a responsible citizen. Continued exposure to random searches of the sort associated with prison life denies the parolee a reasonable opportunity to achieve this new identity as an autonomous, civic-motivated

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part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

citizen. In addition, police searches without any individualized justification or suspicion undermine the individual's trust in the fair processes of law, a trust that may be more efficacious than the deterrent mechanisms of the criminal law in inducing the parolee to commit to voluntary compliance with legal authorities.

ARGUMENT

I. Modern Criminology Has Identified The Crucial Process Of Desistance From Criminal Behavior As The Key To An Offender's Successful Reentry Into Society, And This Process Of Desistance Is Undermined By The Random Police Searches Of Parolees That The California Courts Have Adopted.

A major, indeed probably *the* major, new theme of contemporary criminology is the notion of desistance. Empirical research concerning the rehabilitation of former offenders has established the principle that offenders do not simply or suddenly end their proclivity toward criminal behavior. Indeed, conventional social science explanations for offender behavior have proved inadequate to explain why so many offenders cease to commit crimes even while outside of prison and while still physically able to commit crimes. Under this newer paradigm, many offenders undergo a process called desistance, which involves the creation of a new or renewed "pro-social" identity. Stephen Farrall & Shadd Maruna, *Desistance-Focused Criminal Justice Policy Research: Introduction to A Special Issue on Desistance from Crime and Public Policy*, 42 How. J. of Crim. Just. 358, 358-359 (2004).

Desistance theory has led criminologists to conclude that the most constructive reentry strategy for parolees is to enhance their ability to look forward to a new commitment to values of social citizenship, rather than remain locked in their former criminogenic identity. Stephen Farrall, *Rethinking What Works With Offenders: Probation, Social*

Context And Desistance From Crime (2002). Desistance requires the offender psychologically to separate from his former persona. Thus, to enhance the reintegration of former offenders, society must offer ways of reducing the stigma of diminished legal status that reinforces the former crime-focused self. Shadd Maruna, *Making Good: How Ex-Convicts Reform And Rebuild Their Lives* 165 (2001). The goal of desistance is the creation of a new autonomous citizen who *internalizes* the social good by accepting the challenges of a full civic identity. Sheldon Stryker, *The Past, Present, and Future of an Identity Theory*, 63 Soc. Psychol. Q. 284, 288-289 (2000).

Desistance research has shown that success in reentry requires the offender to change from a passive, rationalizing voice in which he describes his past as one of entrapment in deviance to an active voice by which he articulates his autonomy in choosing a self-determined constructive life. Maruna, *supra*, at 7-8. Desistance is enhanced by such concrete components of normal civic life as marriage, employment, or military service. John Laub & Robert Sampson, *Understanding Desistance From Crime*, 28 Crime and Justice: A Review of Research 1 (M. Tonry ed. 2000). But recent research confirms that establishment of a new civic-minded identity, with social reinforcement of that identity, is as crucial as any material restoration of rights.

A vital step in that process of reinforcement is the recapture of the common right of privacy and anonymity enjoyed by all citizens who avoid giving off any present basis for reasonable suspicion that they are engaged in criminal activity. Christopher Uggen, Jeff Manza & Angele Behrens, *Less Than the Average Citizen—Stigma, Role Transition, and The Civic Reintegration of Convicted Felons*, in After Crime and Punishment: Pathways to Offender Reintegration 261, 262 (Shadd Maruna & Russ Immarigeon eds. 2004). To be successful in reentry, the

offender must reemerge into virtuous participation in the civic world. *Id.* at 263. A major threat to that reemergence is the loss of privacy and anonymity that not only deprives the parolee of the publicly visible rights of citizenship, but also reinforces the stigmatized identity associated with the previous offending self. *Id.* at 276-277. That continued stigma after reentry has been condemned as "invisible punishment." Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in Invisible Punishment: The Collateral Consequences of Mass Imprisonment 15-36 (Marc Mauer and Meda Chesney-Lind eds. 2002).

This research has vindicated, through social science, what this Court had earlier affirmed as a principle of law:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life.

Morrissey v. *Brewer*, 408 U.S. 471, 482 (1972). For these reasons, the Court concluded that the parolee must enjoy "many of the core values of unqualified liberty." *Ibid.*

The psychological processes of desistance require that the offender decide that his criminal behavior is separate from his true self. Stephen Farrall, *Social Capital and Offender Reintegration: Making Probation Desistance-Focused*, in After Crime and Punishment: Pathways to Offender Reintegration 63 (Shadd Maruna & Russ Immarigeon eds. 2004). The successful parolee is the one who manages the psychological challenge of viewing his virtuous identity as the good self that "what was supposed

to be all along." Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 Am. J. of Soc. 420, 421 (1956). "The plan to exit from crime is in large part founded on the self as noncriminal." Tom Meisenhelder, *Becoming Normal: Certification as a Stage in Exiting from Crime*, in Deviant Behaviour: An Interdisciplinary Journal, 137, 140 (1982). The offender must achieve what criminologists call the "agency," a power which is "oriented toward the future . . . projective actions in the transition from adolescence to adulthood advance a new sense of self and a new identity as a desister from crime or, more aptly, as a family man, hard worker, and good provider." John Laub & Robert Sampson, *Shared Beginnings, Divergent Lives* 146 (2003).

These goals are undermined by the power of a police officer, acting solely on the knowledge that the person is a parolee, to treat him as a pre-designated criminal self-suspected of criminal behavior. The continuing expectation of and public humiliation resulting from unregulated police searches destructively reinforce the parolee's "memory traces" of his earlier deviant and incarcerated life, and the self-perceived and publicly attributed stigma deprive him of the social feedback prisoners need to focus on a future, not a past, identity. Stephen C. Richards and Richard S. Jones, *Beating the Perpetual Incarceration Machine: Overcoming Structural Impediments to Re-entry*, in After Crime and Punishment: Pathways to Offender Reintegration 201, 203 (Shadd Maruna & Russ Immarigeon eds. 2004).

If the older criminology simply assumed a moral or cognitive deficiency, the new desistance paradigm calls for activation or reactivation of existing abilities. "Thus, in staking her claim to a conventional identity, the offender commits herself to the ethical code of conduct by which that role is governed and publicly recognized." Judith Rumgay, *Scripts for Safer Survival: Pathways out of Female Crime*, 43 How. J. of Crim. Just. 405, 409 (2004). The offender must entertain an expectation that he or she will be able to

fulfill the expectations of that role, and must be reassured of the "recognition and validation by onlookers of the personal identity expressed by those routines will support its maintenance." *Ibid.* Our activities, responses and displays are moral performances and demonstrations of a social character which profoundly influence our cognitive activities as well." Joseph P. Forgas, *Epilogue, Everyday Understanding and Social Cognition*, in Social Cognition Perspectives on Everyday Understanding 267 (Forgas, ed. 1981).

Moreover, just as exposure of any one member of a household to unregulated police searches stigmatizes all members of that household, so too unregulated police searches in any community with high concentrations of parolees inevitably means that that whole community may feel stigmatized. This deprives individual parolees of the reinforcement of positive civic virtue models they need for desistance. Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry* 293-294 (2000).

II. Denial Of All Fourth Amendment Rights To Parolees Undermines The Trust In The Fairness Of The Criminal Justice System Modern Social Science Has Demonstrated To Be Vital To Inducing A Normative Willingness To Comply With The Law.

The established criminological research on the deterrent power of criminal sanctions proves the incompleteness of the deterrence-based approach. Empirical studies are equivocal as to the success of criminal deterrence, especially because of the so-called threshold effect—*i.e.*, it is the likelihood more than the potential severity of a sanction that most deters potential offenders, and the likelihood factor cannot become psychologically meaningful until it reaches a fairly high threshold that is often infeasible for the police to achieve. But another dramatic paradigm of compliance with law has emerged. The major factor in

causing people to obey the law even when they have no rational fear of sanction is their perception of the procedural fairness of the law. Tom R. Tyler, *Why People Obey the Law* (1990).

Rigorous and extensive experiments in social psychology, reported in the most eminent peer-reviewed journals, establishes that the major determinant of a person's self-initiated willingness to comply with the law is not the fear of sanction or even the likelihood of a self-interested outcome of any legal proceeding, but the person's subjective judgment of the procedural fairness of the legal system. The efficacy of the legal system cannot rest on the frequency and severity of formal sanctions. Rather, it requires cooperation and consent, because only they can facilitate both immediate acceptance and long-term compliance. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime and Justice: A Review of Research 283, 283-285 (M. Tonry ed. 2003). The dominant factor that has been identified as promoting such cooperation and consent is the perception that legal authorities are fair and neutral. This is what social psychology calls "motive-based trust" as opposed to "calculative trust." Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 Boston Univ. L. Rev. 361, 361-366 (2001).

This phenomenon has been confirmed with particular clarity in the area of individual encounters with police. Intensive survey-based empirical research focusing specifically on California showed that the willingness of residents of Oakland and Los Angeles to commit to compliance with the police, even when not facing direct police coercion or sanction, depended on residents' perception that the police had followed routines and processes that were not arbitrary, were unbiased, and that respected their personal dignity, regardless of the actual outcome of any police encounter. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, *supra*, at 330-340.

Respect for the law, especially in former offenders, psychologically requires what has been called "authorization"—the recognition of the legal system as legitimate and the delegation of moral authority to it. Herbert C. Kelman & V. Lee Hamilton, *Crimes of Obedience Toward a Social Psychology of Authority and Responsibility* 16 (1989). In turn, the former offender who acknowledges the legitimacy of the legal system—"authoriz[ing]" it—engages in the feedback mechanism of "self-verification," whereby he commits himself to self-scrutiny of his actions in light of the moral authority he has ascribed to the law. Peter J. Burke & Jan E. Stets, *Trust and Commitment through Self-Verification*, 62 Soc. Psychol. Q. 347 (1999).

It takes little further argument to recognize the implications of this phenomenon for the question of Fourth Amendment rights and parolees. Subjecting the parolee to random, unregulated police searches, without regard to any individual fault or individualized reasonable suspicion of present criminal activity, cannot but undermine the parolee's view of the fairness of the police, as well as the criminal justice system generally. A greater obstacle to the restoration of the parolee's self-motivated normative desire to comply with the law can hardly be imagined.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted.

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NOVEMBER 28, 2004

(4)

No. 04-9728

Supreme Court, U.S.
FILED
JAN 12 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari
To The Court Of Appeal
Of The State Of California

BRIEF OF *AMICUS CURIAE* COUNTY OF LOS ANGELES COUNTY SUPPORTING RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. A CALIFORNIA INMATE MAY ELECT TO SERVE HIS PAROLE PERIOD EITHER: (1) IN CUSTODY, OR (2) OUT OF CUSTODY AND SUBJECT TO THE CONDITION THAT THE INMATE PROVIDE ADVANCE CONSENT TO SUBMIT TO WARRANTLESS, SUSPICIONLESS SEARCHES AND SEIZURES	4
II. A PAROLEE'S VOLUNTARY ADVANCE CONSENT TO SUBMIT TO WARRANTLESS, SUSPICIONLESS SEARCHES IS VALID, PROPER, AND BINDING	6
A. Advance Consent Agreements Have Been Repeatedly Upheld As Constitutional	6
B. Since Parole Is A Privilege And Not A Right, Requiring Advance Consent Is Not An Unconstitutional Condition	8
C. Public Policy Supports Advance Consent Conditions	11
III. THE EFFECT OF A PAROLEE'S VOLUNTARY ADVANCE CONSENT TO SUBMIT TO WARRANTLESS, SUSPICIONLESS SEARCHES	13
A. A Parole Of Probation Search Premised On Prospective Consent Does Not Require Independent Justification	13

TABLE OF CONTENTS – Continued

Page

B. Since No Independent Justification Is Required For An Advance Consent Search, No Justification "Balancing" Is Required... 14

C. An Inmate's Advance Consent Eliminates His Or Her Ability To State A Claim That Police Detention And Search Violated Legitimate Expectations Of Liberty And Privacy 16

D. The Existence And Scope Of A Parolee's Or Probationer's Fourth Amendment Protection Cannot Be Contingent Upon The Subjective Suspicions Or Knowledge Of The Particular Officer Involved 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Alderman v. United States, 394 U.S. 165 (1969) 18

Arizona v. Evans, 514 U.S. 1 (1995) 17

Arkansas v. Sullivan, 532 U.S. 769 (2001) 19

Bell v. Wolfish, 441 U.S. 520 (1979) 13, 14

Berkemer v. McCarty, 468 U.S. 420 (1984) 19

Brady v. United States, 397 U.S. 742 (1970) 8, 11

Brown v. United States, 411 U.S. 223 (1973) 18

Bumper v. North Carolina, 391 U.S. 543 (1968) 7

Devenpeck v. Alford, 543 U.S. 146 (2004) 19

Dolan v. City of Tigard, 512 U.S. 374 (1994) 10, 11

Griffin v. Wisconsin, 483 U.S. 868 (1987) 10, 11

Horton v. California, 496 U.S. 128 (1990) 19

Hudson v. Palmer, 468 U.S. 517 (1984) 13

Illinois v. Krull, 490 U.S. 340 (1987) 18

Illinois v. Lidster, 540 U.S. 419 (2004) 15

Katz v. United States, 389 U.S. 347 (1967) 7

Maryland v. Macon, 472 U.S. 463 (1985) 19

Minnesota v. Carter, 525 U.S. 83 (1998) 18, 21

Moreno v. Baca, ___ F.3d ___, 2005 U.S. App. LEXIS 26906 (9th Cir. Dec. 9, 2005) 14, 21

New Jersey v. T.L.O., 469 U.S. 325 (1985) 18

People v. Bravo, 43 Cal.3d 600, 238 Cal.Rptr. 282 (1987) 7, 12

TABLE OF AUTHORITIES – Continued

Page

People v. Lent, 15 Cal.3d 481, 124 Cal.Rptr. 905 (1975) 7

People v. Mason, 5 Cal.3d 759, 97 Cal.Rptr. 302 (1971) 7, 10

People v. Nicholson, 123 Cal.App.4th 823, 20 Cal. Rptr.3d 476 (2004) 11

People v. Sanders, 31 Cal.4th 318, 2 Cal. Rptr.3d 530 (2003) 14, 21

Rakas v. Illinois, 439 U.S. 128 (1978) 13, 16, 17, 18, 20

Rhode Island v. Innis, 446 U.S. 291 (1980) 19

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 7

Scott v. United States, 436 U.S. 128 (1978) 19

Stansbury v. California, 511 U.S. 318 (1994) 19

Terry v. Ohio, 392 U.S. 1 (1968) 14

Texas v. Brown, 460 U.S. 730 (1983) 7

United States v. Knights, 534 U.S. 112 (2001) 6, 11, 14

United States v. Leon, 468 U.S. 897 (1984) 18, 19

United States v. Ooley, 116 F.3d 370 (9th Cir. 1997) 7

United States v. Padilla, 508 U.S. 77 (1993) 17, 18

United States v. Robinson, 414 U.S. 218 (1973) 20

United States v. Salvucci, 448 U.S. 83 (1980) 18

Whren v. United States, 517 U.S. 806 (1996) 19

Zap v. United States, 328 U.S. 624 (1946) 7

Zap v. United States, 330 U.S. 800 (1947) 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1983 16

California Code Regs., tit. 15, § 2512 2

California *Penal Code*, § 3056 4

California *Penal Code*, § 3060 4

California *Penal Code*, § 3060.5 ..... 3, 5

California *Penal Code*, § 3067 ..... *passim*

OTHER SOURCES

Committee Report for 1995 California Assembly Bill 2284, 1995-1996 Regular Session 3067 9

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

With a population of ten million residents, Los Angeles County is the largest local governmental entity in the nation. The County is home to nearly 36,000 state parolees, some 47,000 adult probationers, and 12,000 juvenile probationers. In addition, California's 70% recidivism rate for parolees is the highest in the nation, accounting for an estimated 8,000 prosecutions for serious crimes in Los Angeles County each year.

Probationers and parolees account for thousands of additional criminal cases in the County annually. The County faces serious logistical hurdles in protecting its citizenry and in combating parolee recidivism. One of the major tools used in this battle is the random surprise parole search, which is currently authorized by state statute. California *Penal Code*, § 3067. In order to be effective, parole supervision must include such "surprise searches" which are not premised on probable cause or even reasonable suspicion. Only then can the County, in general, and law enforcement, in particular, be assured that the parolee is abstaining from criminal conduct and otherwise abiding by the terms and conditions of his or her release.

As an express condition of their parole and/or probation, most – but not all – of Los Angeles County's 95,000 convicted offenders voluntarily provide ***advance consent***

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[1] No counsel for a party authored this brief, in whole or in part, and no person other than the *amicus curiae*, its members or their counsel made a monetary contribution to the preparation or submission of this brief. In addition, all parties have consented to the filing of the instant brief.

to a partial waiver of their Fourth Amendment rights in which they agree to submit their persons, vehicles, residences and effects to warrantless, suspicionless searches and seizures by any peace officer.

The advance consent condition contained in the standard probation and parole agreements constitute a major tool used to effectuate Los Angeles County's dual goal of successfully re-integrating individuals into society and protecting the community. As such, Los Angeles County has a direct interest in the resolution of the issue before the Court in this case.

SUMMARY OF ARGUMENT

In California, most – but not all – convicted offenders provide voluntary ***advance consent*** to a partial waiver of their Fourth Amendment rights in which they agree to submit their persons, vehicles, residences and effects to warrantless, suspicionless searches and seizures by any peace officer. Indeed, this common provision has been codified in *Penal Code*, § 3067.

Although all parolees are subject to this search condition under California law, not all prisoners eligible for parole agree to provide such advance consent on their release form. See Cal. Code Regs., tit. 15, § 2512. Instead, some inmates choose to reject the terms of parole, and suffer an automatic revocation which requires that the

inmate serve the balance of the parole period in custody. *Penal Code*, § 3060.5.[2]

If even a small segment of the prison population is making the conscious choice that time in custody is better than parole conditions on the outside, then those who agree to abide by the terms and provide such advance consent are also making a choice. If this choice is a voluntary one, then the consent given is valid.

Based on this ***advance consent*** – in which the parolee agrees to submit to a warrantless, suspicionless search and seizure by any peace officer – the inmate has no existing, legitimate, subjective or objective expectation of remaining free from police intrusions, so long as the search is accomplished in a reasonable manner. Thus, neither reasonable suspicion nor police foreknowledge of the search condition is required for otherwise-reasonable police intrusions, since the parolee has provided voluntary advance consent to submit to such searches.

Simply stated, if one consents to waive one's right to be free from what would otherwise be an unconstitutional search or seizure, there can be no constitutional violation. In other words, ***police cannot infringe upon a right which has been waived***.

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[2] While it might seem to defy reason that an inmate would not sign a release agreement if it meant an end to incarceration, some inmates take the long view that they do not wish to be subject to search and seizure conditions, housing restrictions, or reporting requirements. Others fear that elevated supervision could result in the discovery of other criminality, which might implicate "strike" priors.

ARGUMENT

I. A CALIFORNIA INMATE MAY ELECT TO SERVE HIS PAROLE PERIOD EITHER: (1) IN CUSTODY; OR (2) OUT OF CUSTODY AND SUBJECT TO THE CONDITION THAT THE INMATE PROVIDE ADVANCE CONSENT TO SUBMIT TO WARRANTLESS, SUSPICIONLESS SEARCHES AND SEIZURES

Parolee recidivism is both a very real concern and a well-documented problem. With over 100,000 adults on supervised parole, California faces serious logistical hurdles administering the twin concerns of protecting society and re-integrating inmates back into society.

To combat these problems, California has established a parole system whereby inmates may be released from physical custody, provided the inmates abide by any number of terms and conditions. During this time, however, the parolee is not a "free man." Instead, the parolee remains in the legal custody of the Department of Corrections while living in the community. *Penal Code*, § 3056. While serving out the balance of his or her term, the parolee must comply with all the terms and conditions of parole. *Penal Code*, § 3060.

Common parole terms include mandatory narcotics testing, prohibitions against violating any law, restrictions against associating with other felons or gang members, and periodic meetings with parole agents. In addition, under California law, all parolees are subject to search and seizure by any law enforcement officers, with or without reasonable suspicion. *Penal Code*, § 3067.

While it is true that all parolees are subject to warrantless, suspicionless searches, that does not mean that

all parolees agree to abide by these terms. Rather, inmates are faced with the hard choice of deciding whether they wish to be released from physical custody subject to increased monitoring and a diminished expectation of privacy, or to complete the balance of their parole terms in custody.

Faced with this difficult decision, most inmates agree to the terms of parole (including a prospective partial waiver of their Fourth Amendment right to be free from warrantless, suspicionless searches) and elect to be released from physical custody. However, some inmates choose to refuse the terms of the parole grant and elect to serve out the remainder of the parole term in physical custody. See *Penal Code*, § 3060.5.

This decision is made for a variety of reasons. Some inmates refuse to abide by housing restrictions or restrictions against associating with known felons or fellow gang members. Others choose to complete their parole in custody to prevent more detailed scrutiny that would occur if they were on parole.

If even a small segment of the prison population is making the conscious choice that time in custody is better than parole conditions on the outside, then those who agree to abide by the terms and provide such advance consent are also making a choice. If this choice is a voluntary one, then the consent given is valid.[3]

[3] Under the terms of *Penal Code*, § 3067, subdivision (b), no inmate may be released from custody unless he agrees to the search provision. This is done to prevent inmates from absconding until after their first meeting with a parole agent. Accordingly, by statute, Samson could not have been a § 2067 parolee without having signed the parole agreement.

In *United States v. Knights*, 534 U.S. 112 (2001), this Court held that a parole search "requires ***no more than*** reasonable suspicion to conduct a search of this probationer's house." *Id.* at 121. However, this Court did not reach the question of whether a search could be justified by ***less than*** reasonable suspicion. Likewise, this Court did not address the question of whether such a search can be justified based on advance consent. See *id.* at 118.

For the reasons set forth herein, *amicus curiae* submits that where a parolee provides voluntary ***advance consent*** to submit to a warrantless, suspicionless search and seizure by any peace officer, the parolee has no existing, legitimate, subjective or objective expectation of remaining free from police intrusions, so long as the search is accomplished in a reasonable manner. Accordingly, this Court should hold that neither reasonable suspicion nor police foreknowledge of search condition is required for otherwise-reasonable police intrusions, since the parolee has voluntarily consented to waive his or her right to such searches.

II. A PAROLEE'S VOLUNTARY ADVANCE CONSENT TO SUBMIT TO WARRANTLESS, SUSPICIONLESS SEARCHES IS VALID, PROPER, AND BINDING

A. Advance Consent Agreements Have Been Repeatedly Upheld As Constitutional

Although the Fourth Amendment generally requires that a search be authorized by a judicial warrant based upon probable cause, it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is

conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). This consent must be voluntary to be constitutionally valid. *Id.* at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

For Fourth Amendment purposes, an individual consent to search may be deemed voluntary even if it is motivated by the subject's belief that refusal to consent will result in concrete disadvantages. See *Schneckloth*, 412 U.S. at 228.

Moreover, an individual may authorize advance consent to a search. See *Zap v. United States*, 328 U.S. 624, 627 (1946).[4] Such an advance consent term, sometimes known as a "Fourth Waiver," is a common term of probation in California. See *United States v. Ooley*, 116 F.3d 370, 371 (9th Cir. 1997).

The California Supreme Court has held that individuals convicted of crimes may be required to consent to future warrantless searches as a condition of probation, and that a consent to search obtained in that manner is valid and enforceable. See, e.g., *People v. Bravo*, 43 Cal.3d 600, 605-611, 238 Cal.Rptr. 282 (1987); *People v. Mason*, 5 Cal.3d 759, 764-766, 97 Cal.Rptr. 302 (1971), disapproved on other grounds in *People v. Lent*, 15 Cal.3d 481, 486, n. 6, 124 Cal.Rptr. 905 (1975).

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[4] The judgment in *Zap* was vacated on other grounds. See *Zap v. United States*, 330 U.S. 800 (1947). This Court, however, has continued to treat *Zap* as good law and has cited it as authority for the proposition that a search based on consent is lawful notwithstanding the absence of a judicial warrant and/or probable cause. See *Schneckloth*, 412 U.S. at 219; *Katz v. United States*, 389 U.S. 347, 358, n. 22 (1967); *Texas v. Brown*, 460 U.S. 730, 736 (1983) (plurality opinion).

The rule that an individual may voluntarily provide advance consent to a search that might otherwise be prohibited by the Fourth Amendment accords with the general principle that an individual may, within broad limits, enter into agreements with the government under which he or she forgoes the exercise of constitutional rights in return for a promise of favorable treatment. Such agreements are not rendered unenforceable simply because the waiver of rights is prompted by the desire to obtain a benefit or avoid a burden, or because the individual is forced to choose between two unattractive alternatives.

For example, in the criminal context, it is beyond dispute that a negotiated criminal plea agreement may be valid and enforceable even where it is motivated by the defendant's belief that he or she is likely to face greater punishment if the case proceeds to trial. See *Brady v. United States*, 397 U.S. 742, 755 (1970) ("plea of not guilty is not invalid merely because entered to avoid the possibility of a death penalty.").

B. Since Parole Is A Privilege And Not A Right, Requiring Advance Consent Is Not An Unconstitutional Condition

Further support for advance consent conditions can be found in the legislative history surrounding Assembly Bill 2284, which later became *Penal Code*, § 3067, aptly demonstrates that the statute was intended to represent a consent condition, stating:

> "Courts have interpreted parole to be a right under California law. Because parole is a right, courts reason that the condition of parole that subjects the parolee to search and seizure by any peace officer is largely ineffective. This is true because the state cannot force an individual to waive one right (Fourth Amendment) in exchange for another (parole rights). Because convicted felons have no right under the law to be granted probation, the courts have allowed the state to require a waiver of Fourth Amendment rights in exchange for the privilege of being released on probation. The irony is this logic dictates that parolees should be much more closely supervised than probationers and should therefore be subject to even stricter search conditions." Committee Report for 1995 California Assembly Bill 2284, 1995-1996 Regular Session.

To combat this problem, the bill, as passed by the assembly, specifically provided as follows:

> "AS PASSED BY THE ASSEMBLY, this bill stated that: 1) Legislative findings and declarations that parole is a privilege, not a right. Therefore, it is the intent of the Legislature that for any inmate who committed a crime on or after January 1, 1997 parole is to be granted only on a conditional basis. 2) Legislative findings and declarations that all parolees be subject to intense supervision and surveillance by law enforcement officers of this state." *Id.*

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right whose

waiver is at issue. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

In contrast, the requirement that parolees provide advance consent to a search directly furthers the state's interest in the effective administration of the parole system. Indeed, in the context of probation cases, the California Supreme Court has explained that, as a matter of state law, "[a] condition of probation is invalid if it (1) has no relationship to the crime of which the defendant is convicted, (2) relates to conduct that is not itself criminal, or (3) requires or forbids conduct that is not reasonably related to future criminality." *Mason*, 5 Cal.3d at 764 (advance consent term constitutional since it is "reasonably related to the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses.").

In this case, as in *Mason*, Samson – by virtue of his status as a parolee – presented a heightened risk of committing further criminal or other antisocial acts, thereby justifying close monitoring and supervision. See *Griffin*, 483 U.S. at 880.

Since the purpose of conditional release is to assist the parolee's reintegration into the community, while minimizing the threat to the public safety and welfare that the release may entail, a search designed to assess the parolee's compliance with the conditions of his or her release is reasonably related to the benefit offered by the state.

Likewise, the parolee's advance consent is not rendered invalid simply because the alternative is imprisonment, especially since parole is considered a privilege and not a right and is to be granted only on a conditional basis. Moreover, as stated above, this Court has repeatedly

recognized that a guilty plea is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. See *Brady*, 397 U.S. at 755.

As such, California's advance consent condition – as codified by *Penal Code*, § 3067 – passes constitutional muster pursuant to *Dolan v. City of Tigard*, 512 U.S. at 385.

C. Public Policy Supports Advance Consent Conditions

Finally, public policy supports the maintenance of warrantless, suspicionless searches. As this Court noted in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), "it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law." *Id.* at 880. Thus, while it is true that the State is concerned about a parolee's reintegration into society, it also has the other concern, quite justified, that a parolee will be more likely to engage in criminal conduct than an ordinary member of the community. *Knights*, 534 U.S. at 120-121.

As the California Court of Appeal has noted, a "parolee constitutes a calculated risk to the safety and security of the community" and "requires his close supervision by his parole officer." *People v. Nicholson*, 123 Cal.App.4th 823, 830, 20 Cal.Rptr.3d 476 (2004). Supervision during this transition is crucial to the State's interest in protecting the community. In California, the ability of law enforcement to conduct random parole sweeps is crucial to its ability to monitor parolees more closely and to ensure that they are abiding by the terms of their probation. This,

in turn, helps to deter the parolees from engaging in additional criminal conduct, thereby protecting society.

Moreover, by allowing parolees the opportunity to consent to such terms, the long-term interests of the class may be furthered. As the California Supreme Court observed in *Bravo*, if

> "A probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose." *Bravo,* 43 Cal.3d at 609.

Finally, if a contrary view were given currency, it would have a detrimental impact both on California's ability to manage effectively its parole system and on a sentencing judge's options. Even worse, it would render the language of *Penal Code*, § 3067 a nullity and would serve to re-write the manifest intent of the parties which executed the advance consent provisions as an express condition of early release from custody.

III. THE EFFECT OF A PAROLEE'S VOLUNTARY ADVANCE CONSENT TO SUBMIT TO WARRANTLESS, SUSPICIONLESS SEARCHES

A. A Parole Or Probation Search Premised On Prospective Consent Does Not Require Independent Justification

"The capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). "The applicability of the Fourth Amendment turns on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Hudson v. Palmer*, 468 U.S. 517, 525 (1984) (citation and internal punctuation omitted).

In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court said that Fourth Amendment "reasonableness" has four components. Courts evaluating a search or seizure "must consider [1] the scope of the particular intrusion, [2] the manner in which it is conducted, [3] the justification for initiating it, and [4] the place in which it is conducted." *Id.* at 559.

A parole or probation condition of suspicionless search and seizure addresses only the third of these factors – justification. The need for any independent, objective justification for a search or seizure (normally some level of suspicion, or consent or a warrant) has been extinguished, for the duration of parole or probation.

This is not a complete elimination of the person's Fourth Amendment protection, for officers' actions must still be reasonable under the three remaining factors. It

would not be reasonable, for example, for officers to show up at a parolee's or probationer's home every night at 3:00 a.m. to conduct a harassing search. The limitations of *Bell* factors 1, 2 and 4 remain as constraints on a searching officer's authority to conduct a search or seizure, even of a parolee or probationer, thereby preventing any justified search from being conducted in an oppressive manner. "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968).

But *whenever* a parolee or probationer who has provided advance consent is subjected to police activity that would otherwise require the objective justification necessary to search or seize a non-parolee and non-probationer, *Bell* factor 3 simply is not in issue. Elimination of the need to prove an independent justification for a parole or probation search or seizure is the extent to which the Fourth Amendment rights of the parolee or probationer have been "significantly diminished." *Knights*, 534 U.S. at 120.

B. Since No Independent Justification Is Required For An Advance Consent Search, No Justification "Balancing" Is Required

Both the California Supreme Court (see, e.g., *People v. Sanders*, 31 Cal.4th 318, 333, 2 Cal.Rptr.3d 630 (2003)) and the United States Court of Appeals for the Ninth Circuit (see, e.g., *Moreno v. Baca*, ___ F.3d ___, 2005 U.S. App. LEXIS 26906 (9th Cir. Dec. 9, 2005) (en banc)) approach parole and probation searches as if they were

subject to the normal Fourth Amendment balancing test, under which courts evaluate justification for a search or seizure by weighing the degree of intrusion upon protected individual interests against the need to promote legitimate governmental interests. *Illinois v. Lidster*, 540 U.S. 419, 427 (2004). This approach – applied by the decisions upon which the judgment against petitioner was based – is both incorrect and unnecessary in the context of parole and probation searches and seizures. To prevent further misunderstanding, this Court should explain the proper analysis.

If the need for independent justification has been lawfully dispensed with, as in parole and probation searches and seizures, conducting a balancing test to assess justification is quite beside the point. The balancing test is appropriate only when independent justification is in issue – namely, when the person contesting a search or seizure can establish that the police conduct infringed his or her own personal, reasonable expectation of remaining free from such intrusions.

Instead of evaluating justification through a balancing exercise, courts should confine their evaluations of parole and probation searches and seizures to a consideration of whether officers exceeded the lawful scope of the condition, or acted in an unreasonable manner in carrying out a search or seizure for which no separate justification is required to be proven.

Simply stated, because a probationer or parolee provides voluntary advance consent to the search, he or she has no right to be free from warrantless, suspicionless searches. And, consequently, there is no constitutional infringement to be remedied by way of either the exclusionary rule in the

criminal context or a suit pursuant to 42 U.S.C. § 1983 in the civil context.

Accordingly, this is not a situation wherein law enforcement is attempting to "retroactively justify" a search. Rather, in the absence of an infringement of some existing and legitimate right, there is nothing to justify.

C. An Inmate's Advance Consent Eliminates His Or Her Ability To State A Claim That Police Detention And Search Violated Legitimate Expectations Of Liberty And Privacy

Petitioner's case is before the Court because he sought to invoke the Fourth Amendment exclusionary rule. Unfortunately, courts often treat such motions to suppress evidence as inevitably and immediately requiring an examination of the officer's asserted justification for the actions that produced the contested evidence, "with barely any mention of the threshold substantive question of whether the search violated [the movant's] own Fourth Amendment rights. . . ." *Rakas v. Illinois*, 439 U.S. 128, 139, n. 7 (1978).

Consideration of that necessary threshold question in the case of parolees and probationers who are subject to a suspicionless search condition quickly and appropriately concludes the exclusionary issue, for unless there are issues as to place, scope or manner of execution, the person's own Fourth Amendment rights will not have been violated, and he will not be entitled to invoke the rule.

For example, in *Rakas*, what obviated any inquiry as to the justification for the vehicle search that produced the evidence that incriminated Frank Rakas, a non-owner

passenger, was the fact that the search did not invade any personal expectation of privacy he could legitimately claim. Therefore, "it was unnecessary to decide whether the search of the car might have violated the rights secured to someone else by the Fourth and Fourteenth Amendments. . . ." *Id.* at 150. Likewise, since the search of petitioner did not invade any personal expectation of privacy he could legitimately claim, it is unnecessary to decide whether Officer Rohleder's conduct would have violated the constitutional rights of a non-parolee.

By now, "It has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search or seizure." *United States v. Padilla*, 508 U.S. 77, 81 (1993). But how can a parolee or probationer who knows he is subject to suspicionless search and seizure by any officer he may confront reasonably maintain that he nevertheless had a subjective expectation that he would not be searched? And how can he justifiably contend that society should find it objectively reasonable for him to do so?

Logically, he cannot. The entire point of the search condition is to authorize intrusions that would otherwise require independent justification, thus depriving the parolee or probationer of the capacity to claim the protection of that particular ingredient of Fourth Amendment reasonableness.

This Court has repeatedly said that reviewing courts should not reflexively order suppression of evidence, merely because police search or seizure activity might not be objectively justifiable in the abstract. *Arizona v. Evans*,

514 U.S. 1, 14 (1995); *Illinois v. Krull*, 490 U.S. 340, 353 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 333, n. 3 (1985); *United States v. Leon*, 468 U.S. 897, 906 (1984). And the Court has repeatedly applied this principle where the proponent of a motion to exclude evidence is unable to establish that challenged police conduct violated his personal, existing, legitimate rights under the Fourth Amendment. *Alderman v. United States*, 394 U.S. 165, 174 (1969); *Brown v. United States*, 411 U.S. 223, 230 (1973); *Rakas v. Illinois*, 439 U.S. at 148-149; *United States v. Salvucci*, 448 U.S. 83, 95 (1980); *United States v. Padilla*, 508 U.S. at 81; *Minnesota v. Carter*, 525 U.S. 83, 90-91 (1998).

Applying these teachings to the case of a parolee or probationer who is lawfully subject to suspicionless search and seizure – and who therefore cannot establish a personal, existing, legitimate expectation of remaining free from such intrusions – resolves the issue in this case, without resort to irrelevant inquiries as to the officer's foreknowledge of the condition, or the existence of particularized suspicion.

The issue on appeal, therefore, is ***not*** whether police can engage in unreasonable searches and seizures (they cannot), nor whether after-acquired evidence can retroactively justify an action already taken (it cannot). The issue presented is whether a parolee has a Fourth Amendment right not to be detained and searched in direct contravention to his previous knowing and voluntary grant of consent.

D. The Existence And Scope Of A Parolee's Or Probationer's Fourth Amendment Protection Cannot Be Contingent Upon The Subjective Suspicions Or Knowledge Of The Particular Officer Involved

Equal protection of the laws is not possible if the degree to which a person is protected by the Constitution is made to depend upon the subjective state of mind of the individual police officer the person chances to encounter. The Court has consistently rejected attempts to tie claims of constitutional error to the motives, intents, or other states of mind of particular police officers. *Devenpeck v. Alford*, 543 U.S. 146, ___, 125 S.Ct. 588, 593-594 (2004) (officer's subjective analysis of probable cause for arrest not determinative); *Whren v. United States*, 517 U.S. 806, 812-813 (1996) (officer's subjective intent not controlling as to justification for detention); *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (*per curiam*) (same); *Scott v. United States*, 436 U.S. 128, 138 (1978) (officer's subjective state of mind not dispositive); *Maryland v. Macon*, 472 U.S. 463, 470-471 (1985) (same); *Horton v. California*, 496 U.S. 128, 138 (1990) (objective standards control, "rather than standards that depend upon the subjective state of mind of the officer"); *United States v. Leon*, 468 U.S. at 922, n. 23 (exploring officers' mindsets to assess constitutional claims "would produce a grave and fruitless misallocation of judicial resources"); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (officer's subjective plan to arrest does not constitute *Miranda* "custody"); *Stansbury v. California*, 511 U.S. 318, 324 (1994) (officer's subjective focus of suspicion "does not bear upon the question whether the individual is in custody for purposes of *Miranda*"); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (determination of *Miranda* "interrogation" not dependent on "the intent of

the police"); *United States v. Robinson*, 414 U.S. 218, 236 (1973) (officer's subjective lack of fear irrelevant to validity of search incident to arrest).

These and other cases stand for the proposition that objective facts, rather than subjective knowledge or suspicions, should be considered in deciding the threshold question of whether or not a person's own legitimate rights could potentially be violated by the contested police conduct. If it appears from the objective facts that no violation could occur, the constitutional inquiry is ended.

Petitioner Samson was on a valid parole condition requiring submission to warrantless, suspicionless search and seizure. The facts of record do not indicate that his search was conducted beyond the scope of this condition, or in an unreasonable manner. All petitioner challenges is the lack of objective justification, which he argues should require at least reasonable suspicion of wrongdoing.

But petitioner's parole condition eliminated any separate requirement of individualized justification; therefore, while petitioner could reasonably expect that any search or seizure of him would be confined to a proper scope and be executed in a reasonable manner, he could no longer reasonably expect to remain free from suspicionless searches and seizures. The officer's personal motive for searching, or his foreknowledge or lack of foreknowledge of the parole condition, could not invest petitioner with protection he no longer enjoyed.

Can a car thief acquire a violable right not to have his victim's automobile searched merely because the officer who stops him is initially unaware that the car is stolen? Of course not. *Rakas v. Illinois*, 439 U.S. at 141, n. 9. Can a burglar or drug dealer acquire a violable right against

warrantless entry of another's home, merely because the officer who entered to arrest him may not have been aware of his status? Surely not. *Minnesota v. Carter*, 525 U.S. at 90-91. Can a parolee or probationer acquire a violable right not to be stopped and searched on the street, merely because the officer may not have realized the person was subject to suspicionless search and seizure? It makes no sense to hold that he can. Police cannot violate a nonexistent right.

Both *People v. Sanders*, 31 Cal.4th at 335, and *Moreno v. Baca, supra*, slip opinion at *3-*5, erroneously concluded that a police officer's lack of foreknowledge of the parolee's or probationer's condition somehow makes unreasonable a search that would be valid if conducted by another officer who happened to be aware of the condition. Both decisions spoke of the impermissibility of attempting "retroactive justification" of a parole or probation search or seizure by the after-acquired knowledge that the person was subject to suspicionless search and seizure.

But as discussed above, there is no issue of justification with respect to parole and probation searches, retroactive or otherwise, so these rulings – which together currently control every parole and probation search in California – are misdirected, and should be corrected. The Court should affirm the ruling below to the effect that no level of suspicion is required in order to conduct a reasonable search or seizure of one who is subject to a valid condition of parole or probation allowing such actions. And the Court should make clear that police lack of foreknowledge of the parole or probationary status of an individual does not revive a temporarily extinguished right.

CONCLUSION

Where a parolee provides voluntary ***advance consent*** to submit to a warrantless, suspicionless search and seizure by any peace officer, the parolee has no existing, legitimate, subjective or objective expectation of remaining free from police intrusions, so long as the search is accomplished in a reasonable manner. Accordingly, this Court should hold that neither reasonable suspicion nor police foreknowledge of a search condition is required for otherwise-reasonable police intrusions, since the parolee already has provided ***advance consent*** to submit to such searches.

Respectfully submitted,

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(7)

No. 04-9728

Supreme Court, U.S.
FILED
JAN 13 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the California Court of Appeal for the First Appellate District

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does a parole condition requiring the parolee to consent to warrantless suspicionless searches that are not arbitrary, capricious or harassing violate the Fourth Amendment?

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 3

Argument 4

I

The threat to public safety posed by parolees creates a special need for close supervision of them by police and parole officers 5

A. The threat 5

B. Policing the bargain 9

C. Public safety as a special need 12

II

The search condition did not violate any reasonable expectation of privacy of the defendant 17

Conclusion 22

TABLE OF AUTHORITIES

Cases

44 Liquormart, Inc. v. Rhode Island, 517 U. S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996) 21

Chandler v. Miller, 520 U. S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997) 15, 16

City of Indianapolis v. Edmond, 531 U. S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) 14, 15

Connecticut Bd. of Pardons v. Dumschat, 452 U. S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981) 5

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Gagnon v. Scarpelli, 411 U. S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) 5, 19

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524 U. S. 357, 118 S. Ct. 2014,
141 L. Ed. 2d 344 (1998) 9, 10, 11, 18

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714 P. 2d 1251 (1986) 5

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968 P. 2d 445 (1998) 4, 15, 18

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Puerto Rico, 478 U. S. 328, 106 S. Ct. 2968,
92 L. Ed. 2d 266 (1986) 21

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123 L. Ed. 2d 1 (1993) 6

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109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) 12, 13, 17

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155 L. Ed. 2d 164 (2003) 20

State v. Benton, 695 N. E. 2d 757 (Ohio 1998) 11

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109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989) 16

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151 L. Ed. 2d 497 (2001) 4, 12, 16, 17, 18

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115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) 22

Young v. Harper, 520 U. S. 143, 117 S. Ct. 1148,
137 L. Ed. 2d 270 (1997) 9, 11

United States Constitution

U. S. Const., Amdt. 4 16

United States Statutes

18 U. S. C. § 3553(a)(2)(C) 5

18 U. S. C. § 3562(a) 5

State Statutes

Cal. Penal Code § 3000 5

Cal. Penal Code § 3067 ..... 17, 18

Cal. Penal Code § 12021 2

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IN THE

Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Parole is an important but risky part of the criminal justice system. While society can reap significant economic and rehabilitative gains from parole and other forms of conditional release, allowing convicted criminals to serve part of their

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

sentence in society instead of prison threatens public safety. Parole search conditions play an important role in limiting parole's danger to society by deterring parolees from committing crimes. Upholding California's parole search conditions preserves public safety and helps the rehabilitation of parolees, which is consistent with the rights of victims and society that the CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On September 6, 2002, San Bruno Police Department Officer Alex Rohleder observed the defendant, Donald Curtis Samson, walking down the street with another adult and baby. Joint Appendix ("J.A.") 10. Samson was on parole for the crime of possessing a firearm by an ex-felon. See J. A. 49; Cal. Penal Code § 12021. Officer Rohleder knew that the defendant was on parole and had heard from other officers that Samson might have a parolee at-large warrant out against him. See J. A. 10. The officer stopped the vehicle and made contact with Samson. *Ibid.* While Samson stated that he had taken care of the warrant, and was in good standing with his parole officer, Officer Rohleder decided to conduct a " 'parole search' " of the defendant. See *ibid.* The sole justification for the search was the search condition of Samson's parole. See *ibid.* One condition of Samson's parole was "that he agreed to 'search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a warrant with or without probable cause.' " J. A. 10-11, n. 3. While Officer Rohleder does not always search parolees, he does so regularly. See J. A. 11. The officer found a cigarette box which contained methamphetamine. See *ibid.*

Samson was convicted of possession of methamphetamine in a jury trial. See J. A. 2. The California Court of Appeal rejected his Fourth Amendment attack on his parole search based on a precedent of the California Supreme Court, J. A. 13-14, and affirmed the conviction with a minor correction. J. A. 29.

The California Supreme Court denied discretionary review on January 13, 2005. J. A. 30. This Court granted certiorari on September 27, 2005.

SUMMARY OF ARGUMENT

Public safety is the Achilles' heel of any parole system. While society can reap substantial benefits from this less costly and more rehabilitative alternative to prison, having convicted criminals serve their sentence in society gambles with public safety. A parole system that cannot protect the public will lose support.

The threat to public safety from parolees is all too real. Studies of felony probationers and parolees show a recidivism rate that is between six to nineteen times the arrest rate for the general population. Probationers and parolees were thus responsible for at least thousands of murders and tens of thousands of other serious felonies.

Allowing both police and parole officers to conduct parole searches helps deal with this problem. Having more officers available for searching supplements the resources of chronically understaffed probation departments. Police are also better trained and more experienced at conducting searches than probation officers. This makes parole searches both more frequent and more effective, which further deters parolee crime. In addition to protecting the public, it also aids in the parolee's rehabilitation.

The threat to public safety posed by parole creates a special need for more extensive supervision of parolees. Certain threats to public safety create special needs for dispensing with the Fourth Amendment's warrant and suspicion requirements. The fact that the particular public safety interest is related to crime prevention does not disqualify it from special needs status, as is demonstrated by airport checkpoints, courthouse searches, sobriety checkpoints, and informative roadblocks.

Allowing a police officer to enforce the search condition does not violate a defendant's reasonable expectation of privacy. There is no right to parole. If the state can deprive a defendant of all Fourth Amendment rights through a prison sentence, then the much lesser Fourth Amendment deprivation found in this case must also be reasonable. Balancing the defendant's minimal privacy interests against society's considerable interest in protecting the public from parolees justifies the search in this case.

ARGUMENT

The present case takes *United States* v. *Knights*, 534 U. S. 112 (2001) and *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987) to the next step. Parole, probation, and other forms of supervising convicted criminals short of imprisonment are vital components of the criminal justice system. See Wilentz, The Partnership of Judges and Probation—Back to the Community, 49 Rutgers L. Rev. 1147, 1150-1151 (1997). While these punishments allow criminals to be supervised at considerably less direct cost to society and can provide a greater means for rehabilitation, public safety is the Achilles' heel of supervisory release. These methods of punishment release convicted criminals into the public, an inherently dangerous proposition which requires that the state be able to monitor the released prisoners effectively. The present case will determine just how effectively the government can protect society from prisoners serving their sentences outside of prison. This case is not about giving the authorities carte blanche to search parolees. California limits the timing and duration of the search, and California's parole searches cannot be arbitrary or oppressive. See *People* v. *Reyes*, 19 Cal. 4th 743, 753-754, 968 P. 2d 445, 451 (1998). While those parole searches do not have to be justified by some form of suspicion other than the status of being on parole, they are still subject to some form of review. This type of search, and nothing more, is at issue in this case.

I. The threat to public safety posed by parolees creates a special need for close supervision of them by police and parole officers.

Maintaining public safety is an essential part of any parole or probation system. See, *e.g.*, *Griffin* v. *Wisconsin*, 483 U. S. 868, 875 (1987); 18 U. S. C. §§ 3562(a), 3553(a)(2)(C); *People* v. *Burgener*, 41 Cal. 3d 505, 532, 714 P. 2d 1251, 1268 (1986); Cal. Penal Code § 3000. While *Griffin* relied on both public safety and rehabilitation to support a special needs finding, see 483 U. S., at 875, the special threats to public safety posed by parolees is sufficient on its own to justify suspicionless searches by police and parole officers in the manner allowed by the California courts.

A. The Threat.

Supervisory release systems must place public safety before any other interest. While society may benefit from employing the cheaper and potentially more rehabilitative parole instead of prison, this form of punishment gambles with public safety. Anyone who is eligible for parole has already demonstrated an unwillingness to conform to the law. See *Griffin*, 483 U. S., at 880. Parolees are thus a far greater threat to commit crimes than the generally law-abiding citizens with whom they share freedom. If a supervisory release system cannot protect the public, public support for it will erode. See Petersilia, Probation in the United States: Practices and Challenges, National Institute of Justice Journal, No. 233, p. 2 (Sept. 1997) (cited below as "Probation in the United States").[2]

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2. Although this case addresses a search condition for parolees, this brief utilizes research and cases on both probation and on parole. There are no differences between the two that should prevent the use of research on probation from supporting the search condition in the present case. This Court generally does not distinguish between the two, as it applies the same due process standard to their revocation hearings, see *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782 (1973), and often uses the terms conjunctively. See, *e.g.*, *Connecticut Bd. of Pardons* v. *Dumschat*, 452

Unfortunately, the threat to public safety is all too real. While this subject has not been researched as extensively as it should be, see Mackenzie et al., The Impact of Probation on the Criminal Activities of Offenders, 36 Journal of Research in Crime and Delinquency 423, 424 (1999), recidivism studies still show that probationers and parolees are responsible for a disturbingly large proportion of crimes.

These studies center on felony probationers. Typically, recidivism is calculated by counting the number of these probationers who have been arrested for a felony during the first 3 years of probation.[3] See Benedict & Huff-Corzine, Return to the Scene of the Punishment: Recidivism of Adult Male Property Offenders on Felony Probation, 1986-1989, 34 Journal of Research in Crime and Delinquency 237, 241 (1997); Langan, Between Prison and Probation: Intermediate Sanctions, 264 Science 791, 792 (May 6, 1994). Estimates of the recidivism rates for felony probationers range from 22% to 65%. See Benedict & Huff-Corzine, *supra*, at 239. A federal study found that 43% of 79,000 probationers were arrested for a felony within a three-year period of probation. See U. S. Department of Justice, Bureau of Justice Statistics, Recidivism of Felons on Probation, 1986-1989, pp. 1, 6 (1992) (Table 4). Indeed, drug use is the best predictor of whether someone will reoffend while on probation. See Mackenzie, *supra*, 36 Journal of Research in Crime and Delinquency, at 439 (Table); Benedict & Huff-Corzine, *supra*, at 245-246. Unfortunately, drug use is far too common among parolees. See Blenko, The

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U. S. 458, 464 (1981); *Reno* v. *Flores*, 507 U. S. 292, 322-323 (1993) (Stevens, J., dissenting). Given the relative lack of research on parole, see Petersilia, Parole and Prisoner Reentry in the United States, in Prisons 479, 486 (M. Tonry & J. Petersilia eds., 1999), it makes sense to utilize both probation and parole research, and to refer to the two interchangeably.

3. Arrest figures understate the scope of the problem, since many crimes never result in an arrest. See *infra*, at 8.

Challenges of Integrating Drug Treatment Into the Criminal Justice Process, 63 Albany L. Rev. 833, 858 (2000).

Even at the lowest recidivism rate, parolees and probationers are much more dangerous to the community than the average citizen. A 22% felony arrest rate over a 3-year period for the general population is unthinkable. Arrest figures reinforce this common sense conclusion. Since several of the recidivism studies took place in the mid-1980's, see Benedict & Huff-Corzine, *supra*, at 238-239, *amicus* will use the 1986 arrest figures for the general population as a comparison figure. In 1986, the arrest rate for Federal Bureau of Investigation (FBI) "index" crimes (the combined arrest rates for 5 violent crimes and 4 property crimes) was 1,091.8 per 100,000 or 1.0918%. U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1987, p. 368 (1988). Assuming that no person is arrested for more than one index crime during any 3-year period at the 1986 rates, the general population rate would be about 3% for the period. The lowest estimated recidivism rate for prisoners on supervisory release, 22%, would still be more than six times this hypothetical arrest rate for the general population, while the high rate of 65% recidivism is over 19 times this arrest rate.

The FBI index is not ideal for comparison, however, as it both includes nonfelonies and excludes felonies from its total. Thus the larcenies counted in the index include many misdemeanor larcenies such as shoplifting. See *id.*, at 563. Similarly, the crime index does not count felonies that do not fall into the property or violence classifications, primarily drug and weapons offenses. See *id.*, at 368, 562-563. Since the drug and weapons arrest totals also do not distinguish between misdemeanors and felonies, adding drug and weapons offenses to the index crimes would create an excessively conservative figure, but one that is still far below the recidivism rate for felony parolees or probationers. The 1986 arrest rate per 100,000 population for drug offenses was 348.6 or 0.3486%, *id.*, at 368, and 80.7 per 100,000 or 0.087% for weapons

offenses. *Ibid.* When added to the index rate of 1.0918%, this would give an annual arrest rate of 1.5274%. Over a 3-year period the maximum arrest rate under this most conservative reasonable estimate would be 4.5822%, which is still less than one quarter of the lowest estimated recidivism rate for probationers, and one-fourteenth of the high rate.

The actual difference is undoubtedly much greater. First, each arrest in the FBI total does not involve a different person; some people will be arrested for more than one index crime during a year or over a 3-year span. See *id.*, at 367, note. More importantly, the arrest rate for those not on supervisory release is actually lower than the total crime index because that index includes the arrests of probationers and parolees, who have a much higher arrest rate than the civilian population.

A parolee's threat to public safety is underscored by the high proportion of state prisoners who were on parole at the time of their offense. As of 1991, 22% of all state prisoners were parole violators, see U. S. Dept. of Justice, Bureau of Justice Statistics, Probation and Parole Violators in State Prison, 1991, p. 3 (1995), and 43% of parole violators had been arrested for a new offense. See *ibid.* "Based on the offense that brought parolees back to prison, [in 1991] these 156,000 offenders committed at least 6,800 murders, 5,500 rapes, 8,800 assaults, and 22,500 robberies, while under supervision in the community an average of 13 months." *Id.*, at 1. Because many crimes go unreported, see U. S. Dept. of Justice, Bureau of Justice Statistics, Criminal Victimization 2003, p. 10 (2004), or unsolved, these arrest figures understate the costs of parole. A ratio of 10 crimes committed to every arrest is considered "a conservative figure," Petersilia & Turner, Prison Versus Probation in California: Implications for Crime and Offender Recidivism, in Community Corrections: Probation, Parole, and Intermediate Sanctions 61, 64 (Petersilia ed. 1998). The federal government has estimated that recidivism of parolees and probationers results in "[p]robation and parole violators . . . compris[ing] 30% of all offenders in State prison for a violent

crime." Probation and Parole Violators in State Prison, at 1. Therefore, the real cost of parole and probation is much higher than the arrest records estimate.

California's experience is no different. The rate of parolees returned to prison with a new term of imprisonment was 13.9% in 2004 and ranged from 10.6% to 21.1% between 1992 and 2003. See California Department of Corrections and Rehabilitation, California Prisoners and Parolees 2004, p. 48 (2005), http://www.corr.ca.gov/OffenderInfoServices/Reports/Annual/CalPris/CALPRISd2004.pdf. Their crimes in 2004 include 97 murders, 591 robberies, 543 assaults with a deadly weapon, 29 rapes, and 56 child molestations. See *id.*, at 49. Within two years of parole 52.83% of California parolees were returned to prison for either new offenses or parole violations. See *id.*, at 84. Parole is a dangerous proposition, even with intensive supervision.

This empirical evidence reinforces the common-sense conclusion that placing convicted criminals in society rather than prison is dangerous enough with adequate supervision, and intolerably dangerous without it. While not every parolee and probationer is equally dangerous, this defendant, with a prior felony conviction, posed a real risk of reoffending. This risk forms a powerful justification for the search in this case.

B. Policing the Bargain.

Parole is a sort of bargain between the parolee and society. The parolee is allowed to remain out of prison "in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 365 (1998); see also *Young* v. *Harper*, 520 U. S. 143, 147-148 (1997). Both sides can benefit from the bargain. The defendant reduces his time in prison and may have a better chance at rehabilitation, while the state gets a less expensive alternative to prison, at least in direct costs. See Petersilia & Turner, *supra*, at 65. Although parole in California does not involve consent on the

part of parolee, see *infra*, at 18, the parolee's release is still conditional.

A parolee who commits a crime breaks the bargain. Crime is a cost not found in most economic comparisons between parole and prison. While parole or probation is not simply an economic issue, understanding its cost helps to determine whether society is getting the benefit of its bargain with probationers. This hidden cost of probation and parole crime makes it likely "that felony probation sentences are more expensive than is commonly assumed, both absolutely and relative to imprisonment . . . ." Petersilia & Turner, *supra*, at 65. Making sure that parolees keep their side of the bargain and imprisoning those who don't is an " 'overwhelming interest' " of the state. See *Scott*, 524 U. S., at 365 (quoting *Morrissey* v. *Brewer*, 408 U. S. 471, 483 (1972)).

Search conditions can help to control the crime expense and preserve society's overwhelming interest in controlling parolees. Parole and probation "restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." *Griffin*, 483 U. S., at 875. By dispensing with warrants, search conditions help the authorities respond more "quickly to evidence of misconduct," *id.*, at 876, and more importantly, help deter probationers from committing crimes. See *ibid.* Too many restrictions on the officer's ability to search the probationer or parolee "would reduce the deterrent effect of the supervisory arrangement. The probationer would be assured that so long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected." *Id.*, at 878 (discussing probable cause requirement).

> "Being on parole with a consent-to-search condition is akin to sitting under the Sword of Damocles: With knowledge he may be subject to a search by law enforcement officers at any time, [the parolee] will be less inclined to

have narcotics or dangerous drugs in his possession. *The purpose of an unexpected, unproved search of defendant is to ascertain whether he is complying with the terms of probation; to determine not only whether he disobeys the law, but also whether he obeys the law.* Information obtained under such circumstances would afford a valuable measure of the effectiveness of the supervision given the defendant and his amenability to rehabilitation." *State* v. *Benton*, 695 N. E. 2d 757, 761 (Ohio 1998) (emphasis in original; internal quotation marks omitted).

While police officers may not share the parole officer's interest in rehabilitation, cf. *Griffin*, *supra*, 483 U. S., at 876, this does not invalidate a search based upon the public safety special interest found in this case. The danger posed by parole crime creates a special need separate from the rehabilitation aspect of *Griffin*. See Part I-C, *supra*. In any event, the deterrence and supervision advanced by police searches also helps to rehabilitate the parolee. Deterring criminal activity can only help the rehabilitation process, as a parolee who commits crime is not rehabilitated.

If society cannot place an effective search condition upon probationers or parolees, then opportunities for early release may dry up. Parolees, probationers, and society should be allowed to continue getting the benefit of the type of bargain found in this case. If not, then society is likely to change that bargain to the detriment of convicted criminals.

Parole is only a conditional release from state custody. The parolee must abide by certain rules imposed by the state or lose his or her liberty. See *Scott*, 524 U. S., at 365; *Young*, 520 U. S., at 147. A typical condition is that the parolee not break the law. See, *e.g.*, Petersilia, Parole and Prisoner Reentry, *supra*, at 503. In California, conviction for a crime can be good cause for revocation of parole. See 3 B. Witkin & N. Epstein, California Criminal Law § 644, p. 846 (3d ed. 2000). A suspicionless search condition will make it easier to determine whether parolees are obeying the law. Given the

considerable risk of reoffending posed by parolees and probationers there is a special need to monitor probationers and parolees. The only question is the extent of this need.

C. Public Safety as a Special Need.

In *United States* v. *Knights*, 534 U. S. 112 (2001), this Court recognized that the threat of recidivism posed by probationers helped support a warrantless search of the probationer's house based upon reasonable suspicion. See *id.*, at 120-121. It noted the high rate of recidivism among probationers, and their extra incentives to conceal evidence of criminal behavior. See *id.*, at 120. The legality of suspicionless searches was not decided in *Knights*. See *id.*, at 120, n. 6. The public safety interests recognized in *Knights* and other cases also support a special need for the type of suspicionless searches of parolees found in California.

While allowing suspicionless searches of parolees promotes public safety, see part I B, *supra*, the question remains as to whether this interest qualifies as a special need under the Fourth Amendment. The special needs that allow law enforcement to dispense with the warrant and lower the necessary suspicion must go beyond society's general interest in law enforcement. See, *e.g.*, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989). Society's interest in protecting itself from the substantial dangers posed by parolees like the defendant satisfies this standard.

The legitimacy of this interest is found in *Griffin* itself. The *Griffin* Court noted that probation was like incarceration, a form of punishment for convicted criminals. See 483 U. S., at 874. Therefore probationers, like prisoners, "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.' " *Ibid.* (quoting *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972)). The special needs in *Griffin* were the reasons for the limits on the probationer's liberty, making sure that "probation serves as a period of genuine rehabilitation

and that the community is not harmed by the probationer's being at large." *Id.*, at 875.

Public safety can qualify as a special need without being attached to rehabilitating parolees. In other contexts, a sufficient threat to public safety supports special needs searches. Thus, drug testing of railway employees involved in certain train accidents was reasonable.

> "The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, 'likewise presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.' " *Skinner*, 489 U. S., at 620 (quoting *Griffin*, 483 U. S., at 873-874).

Since the employees covered by the relevant regulations were "engaged in safety-sensitive tasks," *Skinner*, 489 U. S., at 620, the threat to public safety of drug or alcohol-impaired railroad employees created a special need for the drug testing requirement.

> "This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty. This interest also 'require[s] and justif[ies] the exercise of supervision to assure that the restrictions are in fact observed.' " *Skinner*, 489 U. S., at 621 (quoting *Griffin*, 483 U. S., at 875).

The public safety interest in *Skinner* was relatively removed from law enforcement interests. Train accidents are not necessarily criminal acts, even if intoxication is involved, and this Court left undecided whether the routine use of the tests results in criminal cases would unconstitutionally subvert "the administrative nature of the FRA's program." 489 U. S., at 621, n. 5. But *Skinner* does not set the boundary of the public

safety interest. Special public safety concerns that are much more congruent with law enforcement needs still qualify as special needs.

Griffin is one example. The proceeds of a search substantially justified by public safety were used in a criminal prosecution against the subject of the special needs search. See *Griffin*, 483 U. S., at 870. Indeed, the search condition was justified in part by the fact that sudden searches would deter probationers from committing crimes. See *id.*, at 876. Similarly, drunk driving roadblocks were upheld by this Court even though those who failed the sobriety tests would be arrested. See *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 447 (1990).

Although the *Sitz* opinion did not clearly classify itself as a special needs case, subsequent analysis shows that its public safety rationale is closely allied to law enforcement interests.

> "This checkpoint program [in *Sitz*] was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue. The gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road weighed heavily in our determination that the program was constitutional." *City of Indianapolis* v. *Edmond*, 531 U. S. 32, 39 (2000).

The roadblock in *Edmond* was struck down because its purpose, narcotics interdiction, was just part of a general interest in crime control. See *id.*, at 42. While narcotics are undoubtedly dangerous, it is a generalized danger with no particular ties to automobiles. "Only with respect to a smaller class of offenses, however, is society confronted with the type of *immediate, vehicle-bound* threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate." *Id.*, at 43 (emphasis added).

Edmond must not be read too broadly. The more general language in that opinion must be read "as referring in context to circumstances similar to the circumstances then before the Court and not referring to circumstances that the Court was not then considering." *Illinois* v. *Lidster*, 540 U. S. 419, 424 (2004). *Edmond*'s "general interest in crime control" is not synonymous with "every 'law enforcement' objective." *Ibid.* Although it is a public safety interest, protecting the public from parolees is far from *Edmond*'s general law enforcement interest.

The present case is more closely analogous to *Sitz* than *Edmond*. The search condition is limited to parolees, a group which presents a significant, special threat to public safety. See Part I-A, *supra*. There was no logical limit to the roadblock in *Edmond*. If it was upheld, "the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." 531 U. S., at 42. The logic of parole searches is much more limited, extending no further than parolees. Also, California law places some limits on the authority to search under the parole condition. Oppressive or arbitrary searches are not allowed under the search condition. *People* v. *Reyes*, 19 Cal. 4th 743, 753-754, 968 P. 2d 445, 451 (1998). The limited, special need in this case is not diminished by *Edmond*.

An interest is not disqualified from being special if it is related to crime prevention. If there is something about a particular situation or relationship that makes it unusually dangerous to public safety, then a special needs search may be justified. "[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings." *Chandler* v. *Miller*, 520 U. S. 305, 323 (1997).

This is illustrated by the purest public safety special needs searches, airport and courthouse checkpoints. Millions of innocent individuals are subjected to electronic intrusions upon

"their persons . . . and effects," cf. U. S. Const., Amdt. 4, simply because the threat to public safety from terrorism in airplanes made any other response unreasonable.

> " 'When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.' " *United States* v. *Edwards*, 498 F. 2d 496, 500 (CA2 1974) (emphasis added by *Edwards* Court) (quoting *United States* v. *Bell*, 464 F. 2d 667, 675 (CA2 1972) (Friendly, J., concurring)), quoted with approval in *Treasury Employees, Inc.* v. *Von Raab*, 489 U. S. 656, 675, n. 3 (1989).

Courtroom searches provide an even better example of how the need for suspicion can give way to security needs. People entering courts are often subject to suspicionless searches like the airport checkpoints. See 5 W. LaFave, Search and Seizure § 10.7(a), pp. 313-314 (2004). These searches can be even more intrusive than their airport counterparts. While people freely subject themselves to the airport searches in order to travel by air, witnesses and jurors are compelled by law to enter courthouses and subject themselves to the search. In spite of this, courts routinely uphold these searches. See *id.*, at 314-316. Parolees pose a much greater threat to safety than the average airline passenger or courthouse denizen, which justifies greater level of intrusion than found in those searches.

Parole presents an unusual danger to public safety, releasing into society an individual who "is more likely than the ordinary citizen to violate the law." *Griffin*, 483 U. S., at 880; see also *United States* v. *Knights*, 534 U. S. 112, 120 (2001). It is a danger that is all too real. See Part I-A, *supra*. It is "a concrete danger demanding departure from the Fourth Amendment's main rule." Cf. *Chandler*, 520 U. S., at 319. Given the high

likelihood of reoffense, there is a special need to closely monitor parolees. In essence, parolees are inherently suspicious. They are proven guilty, not presumed innocent. They pose a far greater risk to public safety, and consequently must be monitored much more closely than the presumptively innocent person.

II. The search condition did not violate any reasonable expectation of privacy of the defendant.

Following general Fourth Amendment practice, in special needs cases this Court has "not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context." *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989). In addition to Fourth Amendment reasonableness analysis, this Court will also uphold warrantless or suspicionless searches that are justified by special needs. See, *e.g.*, *Griffin* v. *Wisconsin*, 483 U. S. 868, 875 (1987). In *Griffin*, this involved justifying a regulatory system that applied a search condition to every grant of probation. See *id.*, at 870-871. That inquiry took place in the context of the probationer's very limited privacy interests. See *id.*, at 874. This Court then concluded that both the warrant and probable cause requirements would needlessly interfere with the special needs of the probation system. See *id.*, at 877-878. Even without special needs, departures from the warrant and probable cause requirements can be justified under the general balancing of interests that is the foundation of Fourth Amendment analysis. See *United* States v. *Knights*, 534 U. S. 112, 117-118 (2001).

One difference between the two cases is that Samson had notice that consent to suspicionless searches was a condition of his parole, see Cal. Penal Code § 3067(a), while the search condition was imposed retroactively on Griffin. See *Griffin*, 483 U. S., at 870-871, and n. 1 (crime in 1980, regulation promulgated in 1981). This substantially reduces defendant's

expectation of privacy, placing his search on an even more solid constitutional footing than the one ratified in *Griffin*.

This does not mean that the search condition was consensual in the same sense as a contract between equal parties or even the consent to probation raised by the government in *Knights*. See 534 U. S., at 118. Unlike probation, which can be refused, in California the prisoner must accept parole. See *People* v. *Reyes*, 19 Cal. 4th 743, 749, 968 P. 2d 445, 448 (1998). Although there is no consent in the traditional sense, Samson is still serving a conditional release from prison. Cf. *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 365 (1998) (parole as conditional release). He must abide by his conditions of parole, or risk losing his conditional freedom for the much greater invasion of privacy found in prison. Unlike *Griffin*, the search condition was in the law before he started his parole. The condition was part of Samson's sentence. While more invasive than the conditions upheld in *Knights* and *Griffin*, California's search condition serves the vital interests of protecting public safety and helping to determine whether Samson is following his parole conditions.

The parole search condition in this case is part of the defendant's sentence, as it is now for every person convicted of a parole-eligible crime in California. See Cal. Penal Code § 3067. When Samson committed the crime for which he was eventually paroled, the search condition was part of the punishment that he had notice was a consequence of conviction. While the defendant may not have genuinely consented to his search condition, see *Reyes*, 19 Cal. 4th, at 749, 968 P. 2d, at 448, the fact that this is part of the statutory definition of parole reduces his reasonable expectation of privacy.

A felony conviction entitles the state to make substantial inroads upon the prisoner's privacy. A state does not have to offer parole instead of prison. It is an "act of grace" from the state to the parolee. See *Escoe* v. *Zerbst*, 295 U. S. 490, 492 (1935) (probation); *People* v. *Rodriguez*, 51 Cal. 3d 437, 445,

795 P. 2d 783, 788 (1990). While this does not deprive the parolee of other rights such as due process, see *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782, n. 4 (1973) (distinguishing *Escoe*), parole's status as a privilege is relevant to the Fourth Amendment analysis.

The state can deprive a convicted criminal of all of his or her Fourth Amendment rights.

> "Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate *any* subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches *does not apply* within the confines of the prison cell." *Hudson* v. *Palmer*, 468 U. S. 517, 525-526 (1984) (emphasis added).

If this complete deprivation of Fourth Amendment rights is constitutional, then it is reasonable for a state to subject a grant of parole to a lesser, albeit broad, deprivation such as the search condition in the present case.

Prison inmates lose their expectation of privacy in prison for several reasons. The loss of privacy in one's cell is broadly supported by "the concept of incarceration and the needs and objectives of penal institutions." *Id.*, at 526. Institutional security was a significant concern, see *id.*, at 526-527, along with similar concerns like controlling the flow of contraband and maintaining sanitation. See *id.*, at 527. Parole raises similar concerns. Parolees and probationers pose a significantly greater risk to public safety than the average person. See Part I, *supra*. Discouraging the parolee from obtaining drugs or firearms is consistent with the rehabilitative and public safety goals of parole. See Part I-B, *supra*. These create a special need for a substantially reduced expectation of privacy for parolees. See Part I-C, *supra*.

Sentences are not just about security and rehabilitation. In addition to incapacitating criminals and giving them opportunities to rehabilitate, sentences also punish. If prison, or sentences short of prison, are to succeed, they must first punish the criminal. The quality of punishment gives the criminal law its deterrent, and the punitive quality of sentencing also serves the worthwhile goal of retribution. See *Gregg* v. *Georgia*, 428 U. S. 153, 183-186 (1976) (lead opinion). If the consequence of a criminal conviction does not punish, then it is not a sentence.

This need to punish is another justification for depriving convicted criminals of their privacy. Prison, or any alternative, *should* induce some burden on the person being punished. Typically this involves some " 'affirmative disability or restraint.' " *Smith* v. *Doe*, 538 U. S. 84, 99 (2003) (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168 (1963)). A lack of privacy, in addition to serving the security interests noted in *Hudson*, also helps to punish convicted criminals. While parole is a lesser punishment than prison, it is still a punishment. The search condition advances the interests of keeping Californians safe, fostering rehabilitation, and making sure that the sentence continues to punish the lawfully convicted criminal.

The criminal conviction substantially diminishes the parolee's reasonable expectation of privacy. A person committing a crime in California is responsible to know that he or she can be subject to the near complete deprivation of privacy inherent in a prison sentence, or the lesser deprivation of the parole search condition. While the state's authority to punish is limited by the Eighth Amendment, given the considerable deference given to noncapital sentences under the Eighth Amendment, see *Ewing* v. *California*, 538 U. S. 11, 25 (2003) (plurality), there is no credible Eighth Amendment claim against the California search condition.

While it requires careful application in constitutional law, "the proposition that greater powers include lesser ones" is still

valid as a matter of logic. See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 511 (1996) (plurality opinion). The problems with its application to constitutional law have come from improper use in First Amendment cases. See Scheidegger, Habeas Corpus, Relitigation and the Legislative Power, 98 Colum. L. Rev. 888, 953-954 (1998). In *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328 (1986), this Court held that the power to ban gambling necessarily included the lesser power to prohibit the advertising of gambling. See *id.*, at 345-346. The subsequent disapproval of *Posadas* correctly notes that regulating speech is not a lesser included power of regulating conduct. "The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." *44 Liquormart, supra*, at 512.

That has not happened in this Fourth Amendment case. Parole is not qualitatively different from incarceration in the way that speech is qualitatively different from conduct. "Probation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service," *Griffin*, 483 U. S., at 875, and parole is simply another point on that continuum. What happened to Samson was less intrusive to his privacy interests than what the state could have done had it chosen to withdraw parole as an alternative to prison. This lesser deprivation must also be deemed reasonable in light of what Samson could have faced in prison.

Defendant was a convicted criminal who was serving part of his sentence in the community. In order to protect the community, Samson was subject to warrantless, suspicionless searches by any law enforcement officer as a condition of being given the relative freedom of parole. This case is about giving the state and criminal defendants the freedom to craft alternative punishments to imprisonment. A state should be given the

freedom to craft alternatives to prison that still punish while maintaining public safety.

The balance of society's interests and the defendant's privacy expectations favors the search. The threat to public safety posed by parolees creates a special interest in deterring probationer's criminal tendencies through the prospect of warrantless searches by police officers without regard to the searching officer's motive. See Part I, *supra*. As demonstrated above, defendant's expectation of privacy "that society recognizes as 'legitimate,' " *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 654 (1995), is small. A search subject to the parole search condition as interpreted by the California courts is reasonable.

Upholding this search would encourage creative alternatives to prison. Both society and those parolees who genuinely wish to reform would benefit by upholding the search of Samson. A judicial rejection of this condition of Samson's conditional release will lead to more crime and further pressures to limit parole.

CONCLUSION

The decision of the California Court of Appeal should be affirmed.

January, 2006

Respectfully submitted,

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GRANTED

(3)

No. 04-9728

FILED
JAN 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2005

DONALD CURTIS SAMSON

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA

Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT, THE PEOPLE OF THE STATE OF CALIFORNIA BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

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TABLE OF CONTENTS

Pages

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT, THE PEOPLE OF THE STATE OF CALIFORNIA BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES 1

INTEREST OF AMICUS CURIAE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. A SUSPCIONLESS SEARCH IS SUBJECT TO THESPECIAL NEEDS DOCTRINE 3

II. A PAROLEE'S EXPECTATION OF PRIVACY IS SO DIMINISHED AS TO REQUIRE LITTLE JUSTIFICATION UNDER THE SPECIAL NEED DOCTRINE 6

III. THE SPECIAL NEEDS OF THE STATE TO MONITOR AND SUPERVISE PAROLEES ARE COMPELLING 10

A. THE SPECIAL NEEDS OF SUPERVISION JUSTIFY A WARRANTLESS AND SUSPICIONLESS SEARCH 12

B. THE INCLUSION OF LAW ENFORCEMENT IN THE SEARCH SCHEME IS REASONABLE 14

C. THE PAROLE SEARCH SCHEME NOTIFIES THE PAROLEE OF THE SEARCH CONDITION AND PROHIBITS AN ARBITRARY AND OPPRESSIVE SEARCH 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

City of Indianapolis v. Edmond
531 U.S. 32, 121 S.Ct. 447,
148 L.Ed.2d 333 (2000) 3, 16

Ferguson v. City of Charleston
532 U.S. 67, 121 S.Ct. 1281,
149 L.Ed.2d 205 (2001) 3, 16

Griffin v. Wisconsin
483 U.S. 868, 107 S.Ct. 3164,
97 L.Ed.2d 709 (1987) 5, 10, 12, 13, 17

Hudson v. Palmer
468 U.S. 517, 104 S.Ct. 3194,
82 L.Ed.2d 393 (1984) 2, 4, 5, 7, 8

Morrissey v. Brewer, 408 U.S. 471, 477,
92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) 8, 10

National Treasury Employees Union v. Von Raab
489 U.S. 656, 668, 672, 109 S.Ct. 1384,
103 L.Ed.2d 685 (1989) 5, 17, 18

New York v. Burger
482 U.S. 691, 708-711, 107 S.Ct. 2636,
96 L.Ed.2d 601 (1987) 5, 15, 17

Pennsylvania Board of Probation and Parole v. Scott
524 U.S. 357, 365, 118 S.Ct. 2014,
141 L.Ed.2d 344 ..... 8, 12

People v. Middleton
131 Cal.App.4th 732, 740 (2005) 18

People v. Reyes
19 Cal.4th 743 (1998)..... 7, 10

Skinner v. Railway Labor Executives' Assn
489 U.S. 602, 627-628, 109 S.Ct. 1402,
103 L.Ed.2d 639 (1989)..... 3, 6, 17, 18

United States v. Crawford
372 F.3d 1048 (9th Cir. 2004)..... 8, 11, 12, 14

United States v. Knights
534 U.S. 112, 122 S.Ct. 587,
151 L.Ed.2d 497 (2001)..... 2, 3, 6, 9, 16

Veronia School District v. Wayne Acton, 515 U.S. 646, 664-665, 115 S.Ct. 2386,
132 L.Ed.2d 564 (1995)..... 6, 14, 17

California Penal Code

Section 12020..... 9

Section 26500..... 1

Section 3000, subdivision (a)(1)..... 12

Section 3056..... 8

Section 3067..... 9

Section 3067, subdivision (a)..... 17

Section 3067, subdivision (d)..... 17

California Code of Regulations

Ttitle 15, section 2511..... 9

Ttitle 15, section 2512 ..... 8, 9

Title 15, section 2513 9

Constitution and Statutes

United States Constitution,
Amendment IV 2, 3, 4, 5, 17, 18, 20

Other Authorities

Los Angeles County Charter section 25 (1995) 1

No. 04-9728

In The
SUPREME COURT OF THE UNITED STATES
October Term 2005

DONALD CURTIS SAMSON

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA

Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT, THE PEOPLE OF THE STATE OF CALIFORNIA BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing as the authorized law officer of the county, pursuant to Supreme Court Rule 37, subdivision 4.[1]

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1. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board of Commission.

It is provided in the California general law that:

> The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Government Code section 26500. (West 1998).

INTEREST OF AMICUS CURIAE

The Los Angeles County District Attorney's Office is the largest prosecutorial agency in the state of California. The majority of inmates in the California State prison system come from Los Angeles County and the majority of parolees are Los Angeles County parolees. The necessity for close monitoring and supervision of parolees including where appropriate, searches by law enforcement officers of parolees based on California state law, is of utmost importance to the Los Angeles County District Attorney's Office. This case squarely presents an issue reserved by this court in *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001). Does the Fourth Amendment to the United States Constitution preclude a law enforcement officer from conducting a suspicionless search of a parolee, who is subject to that search under California state law, when the officer is aware of the individual's status as a parolee? For all of the reasons set forth in this amicus curiae brief, it is the position of the Los Angeles County District Attorney's office that such searches are permitted.

SUMMARY OF ARGUMENT

A suspicionless search must be justified under the special needs doctrine. The necessity and extent of the justification is controlled in part by the expectation of privacy to which the person is entitled. In *United States v. Knights*, 534 U.S. at 119, (hereinafter *Knights*), this Court posited a continuum of expectations of privacy based upon the degree of punishment to which a person has been subjected by the State. A parolee's expectation of privacy is only slightly greater than that of the prison inmate. *Hudson v. Palmer*, 468 U.S. 517, 530, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).

The police officer in the instant case knew about the parolee's status. His purpose in conducting the search was intimately related to the supervision and monitoring of the parolee. Thus, justification for the search is based upon the special needs of the State to supervise the parolee and need not be subjected to the totality of the circumstances test. *Knights*, 534 U.S. at 118.

Where an officer knows about the search condition and also has evidence amounting to a reasonable suspicion of criminal activity, a search may be found to be justified *either* as a special need of the State, or reasonable under the totality of the circumstances. The fact that this Court found the search in *Knights* to be reasonable under the totality of the circumstances does not preclude an analysis that the search was also justified because of the special needs of the State.

Law enforcement's involvement in a search scheme to monitor and supervise parolees does not render the search scheme unconstitutional. The cases of *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) (hereinafter Edmond) and *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (hereinafter *Ferguson*), which involved warrantless, suspicionless searches of everyday citizens who enjoy the presumption of innocence, are inapposite where a parolee with a diminimus expectation of privacy is subject to such a search.

A parolee's residual expectation of privacy to be free of arbitrary, capricious and harassing searches comports with a fundamental purpose of the Fourth Amendment to prevent arbitrary and oppressive acts of the Government. *Skinner v. Railway Labor Executives' Assn*, 489 U.S. 602, 627-628, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (hereinafter *Skinner*) The search in this matter was not arbitrary, capricious or harassing and thus reasonable under the Fourth Amendment.

ARGUMENT

I. A SUSPCIONLESS SEARCH IS SUBJECT TO THE SPECIAL NEEDS DOCTRINE

This case squarely presents an issue specifically reserved by this Court in *Knights*, – under what circumstances, is a warrantless, suspicionless search of a parolee reasonable under the Fourth Amendment?

The question presented here is a very narrow one. Namely, if a law enforcement officer knows that the individual

is on parole and subject to a search condition, is a suspicionless search reasonable under the Fourth Amendment because of the special need of the state to closely monitor and supervise the parolee?

This Court has consistently applied the special needs doctrine to justify a warrantless, suspicionless search. In *Hudson v. Palmer*, 468 U.S. 517, this Court held that within the prison system, officials must ensure the safety of the staff, inmates and visitors; prevent the introduction of drugs and weapons into the prison; foil escape attempts, and maintain a sanitary living environment. *Id.* at 526-527. This Court further held that the expectations of privacy of the inmate that society was willing to recognize, were non-existent.

> We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security.

Id. at 528. The needs of the penal institution then were so compelling that even random searches, conducted without any established plan, were justified.

> "For one to advocate that prison searches must be conducted only pursuant to an enunciated general policy or when suspicion is directed at a particular inmate is to ignore the realities of prison operation. Random searches of inmates, individually or collectively, and their cells and lockers are valid and necessary to ensure the security of the institution and the safety of inmates and all others within its boundaries. This type of search allows prison officers flexibility and prevents inmates from anticipating, and thereby thwarting, a search for contraband." *Marrero v. Commonwealth*, 222 Va. 754, 757, 284 S.E.2d 809, 811 (1981)
>
> We share the concerns so well expressed by the Supreme Court and its view that wholly random searches are essential to the effective security of penal institutions.

Hudson v. Palmer, 468 U.S. at 529.

In *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), this Court again resorted to the special needs exception to the warrant and probable cause requirement in the warrantless search of a probationer. The Wisconsin probationary scheme authorized a warrantless search if there existed "reasonable grounds" to believe that the probationer was in possession of contraband. The state Supreme Court of Wisconsin upheld the search, finding that a search based upon reasonable grounds, coupled with the probationer's reduced expectation of privacy was consistent with the Fourth Amendment. *Id.* at 872. However, in *Griffin*, this Court declined to impose a "reasonable grounds" standard on the search and instead found the warrantless search reasonable because of the special needs of the State to closely monitor and supervise its probationers.

> Supervision, then, is a "special need" of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large.

Id. at 875. Like the incarcerated inmate, the reduced privacy right of the probationer and the special needs of the State, again justified a search without a warrant, and a "replacement of the standard of probable cause by 'reasonable grounds'"–a standard called for in the Wisconsin statute. *Id.* at 876.

Warrantless and suspicionless searches of individuals who, unlike the inmate and probationer in *Hudson* and *Griffin*, enjoy the presumption of innocence, have also been upheld by this Court. *See New York v. Burger*, 482 U.S. 691, 708-711, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (warrantless searches of automobile junkyards pursuant to inspection statutes upheld, recognizing the special need of the State to regulate certain businesses and the reduced expectation of privacy of an owner of a commercial premises in a closely regulated industry); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668, 672, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) (hereinafter *Von Raab*) ("the Government's need to conduct the suspicionless searches required by the Customs program

outweighs the privacy interests of employees engaged directly in drug interdiction," such employees being "directly involved in the interdiction of illegal drugs ... have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test."); *Skinner*, 489 U.S. at 627, 628 ("expectations of privacy of covered employees are diminished by reasons of their participation in an industry that is regulated pervasively to ensure safety" and "the Government interest in testing without a showing of individualized suspicion is compelling"); *Veronia School District v. Wayne Acton*, 515 U.S. 646, 664-665, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (hereinafter *Veronia*) (random drug testing of school athletes was upheld: "Taking into account all the factors we have considered above–the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search–we conclude Veronia's Policy is reasonable and hence constitutional.")

In each of the above cases, in addition to the compelling need of the State justifying a warrantless and suspicionless search, the person to be searched had a reduced expectation of privacy. Except for a convicted felon confined within the four walls of a prison, no other person has a lesser expectation of privacy than the convicted felon conditionally released on parole.

II. A PAROLEE'S EXPECTATION OF PRIVACY IS SO DIMINISHED AS TO REQUIRE LITTLE JUSTIFICATION UNDER THE SPECIAL NEED DOCTRINE

In *Knights*, 534 U.S. 112, this Court recognized that there exists in the criminal justice system a continuum of punishments for which there are varying degrees of liberty interests that are invaded by a search.

> "Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.'" [Citations.] Probation is "one point ...

> on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." 483 U.S. at 874. Inherent in the very nature of probation is that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled.'" *Ibid.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972)). Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.

Id. at p. 119. Thus, running alongside the continuum of punishments is a continuum of privacy interests in a reverse scale; the more severe the punishment that is imposed–therefore the more onerous the infringement on one's liberty interest–the less the privacy right that one can expect. *Cf. People v. Reyes*, 19 Cal.4th 743 (1998) ("[T]he court looks to a hierarchy of privacy interests. Reasonable expectations of privacy that society is prepared to recognize as legitimate receive the greatest level of protection; diminished expectations of privacy are more easily invaded; and subjective expectations of privacy that society is not prepared to recognize as legitimate have no protection. [Citations.]")

On the top-most rung of the punishment continuum, but on the bottom-most rung of the privacy interest continuum, is the convicted felon serving a term of imprisonment in a penal institution. While a prison inmate retains some constitutional rights such as the protection of due process, and the right to be protected from cruel and unusual punishment, an inmate has no right of privacy, even from arbitrary, capricious or harassing searches. (*Hudson v. Palmer* (468 U.S. 517, 523, 529, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983).

The next rung in the continuum of privacy interests, just above the convicted felon incarcerated in prison, is the same felon released on parole under the supervision and control of the Department of Corrections. These parolees are the same

individuals who this Court has recognized as individuals who have demonstrated a "proclivity for anti-social criminal, and often violent conduct." *Hudson v. Palmer*, 468 U.S. at 526; *see also Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 365, 118 S.Ct. 2014, 141 L.Ed.2d 344 (hereinafter *Scott*) ("Parole is a 'variation on imprisonment of convicted criminals,' *Morrissey v. Brewer*, 408 U.S. 471, 477, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972), in which the State accords a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release.")

Once on parole, the parolee remains in the legal custody of the Department of Corrections. Cal. Pen. Code § 3056,[2] and is subject to numerous conditions and restrictions on his liberty. California Code of Regulations, title 15, section 2512, lists other conditions of parole that govern a parolee's life, including requiring a parolee to report any change of residence in advance; notifying the parole agent of a change of employment

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2. California Penal Code section 3056 states:

> Prisoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the inclosure of the prison.

See also United States v. Crawford 372 F.3d 1048 (9th Cir. 2004) (en banc) (Trott, J., concurring)

> Eventually, Crawford became a California state parolee. In this capacity, California law impressed on him a legal status that materially altered his relationship with the *Fourth Amendment* and its warrant requirement. .... As the district court correctly said – before it became distracted by our mistaken decision in *United States v. Knights*, 219 F.3d 1138 (9th Cir. 2000), since overturned by the Supreme Court in *United States v. Knights*, 534 U.S. 112 ... – "Under California law, a parolee is in fact in the custody of the Department of Corrections...." *See Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir. 1975) (en banc) ("A California parolee is in a different position from that of an ordinary citizen." He is still serving his sentence.)

Id. at p. 1063.

within 72 hours of any change; not traveling more than 50 miles from his residence without prior approval; not leave the county of residence for more than 48 hours; and not leave the state without prior written approval. A parolee may not own or possess any firearm, any weapon described in Penal Code section 12020, or any knife with a blade longer than two inches, with certain exceptions for the kitchen and employment, and the parolee may not possess a crossbow. (Cal. Code of Reg., tit. 15, § 2512.) Special conditions of parole that may be imposed include, participation in a psychiatric treatment program; participation in a residential program; abstaining from alcohol; anti-narcotics testing; maintaining a residence with a street address approved in writing; no active participation in a gang or participation with a gang or disruptive group; and no acquiring of tattoos. (Cal. Code of Reg., tit. 15, § 2513.)

The public has further codified what level of privacy it is willing to recognize for the parolee in California. Through its elected officials, society has mandated in every case that a convicted felon released on parole must submit himself to search and seizure of his person, residence or property by any parole or law enforcement officer, at any time, with or without a warrant, with or without cause. *See* Cal. Code Reg., tit. 15, § 2511; Cal. Pen. Code § 3067. California Penal Code section 3067, subdivision (a), requires that:

> Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.

Cal. Pen. Code § 3067, subd. (a). Samson was therefore unambiguously informed of his search condition, and the condition "significantly diminished" his expectation of privacy. *Knights*, 534 U.S. at 119-120.

Given the stringent restraints placed upon the parolee and his status as a convicted felon recently released from prison, the parolee is entitled to no more than to be free from arbitrary and oppressive searches by the Government. That is,

as phrased by the California Supreme Court, the only expectation of privacy that a parolee has, and that society is willing to recognize, is an expectation to be free of arbitrary, capricious and harassing searches. *People v. Reyes*, 19 Cal.4th at 753-754.

III. THE SPECIAL NEEDS OF THE STATE TO MONITOR AND SUPERVISE PAROLEES ARE COMPELLING

The special needs of the State in supervising a probationer or parolee were established by this Court in *Griffin v. Wisconsin*, 483 U.S. 868.

> A State's operation of a probation system, like its operation of school, government office or prison, or its supervision of a regulated industry, likewise presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.

Id. at 873-874. This Court further observed that probationers and parolees "do not enjoy 'the absolute liberty to which every citizen is entitled, but only ... conditional liberty properly dependent on observance of special ... restrictions.' *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)." *Id.* at p. 874.

> These restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. [Citation.] These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed.... Supervision, then, is a "special need" of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large.

Griffin v. Wisconsin, 483 U.S. at 875. The special needs apply no less and even more so to the parolee for whom a court or

legislature had determined that immediate incarceration was warranted.

California faces an overwhelming challenge in supervising its parolees.

> According to the authoritative California Journal, as of August 2000, California had 158,177 inmates in its prisons. Jeremy Travis and Sarah Lawrence, *California Parole Experiment,* Cal. J. (Aug. 2002). Of that population, 126,117 inmates were released on parole during that year. *Id.* Sadly, of that figure, 90,000 were returned to prison, either following a conviction of a new crime or for violating parole conditions. The California Criminal Justice Statistics Center's report prepared in April 2001 indicates that 68% of adult parolees are returned to prison: 55% for a parole violation and 13% for the commission of a new felony offense. California Attorney General, *Crime in California*, April 2001, at 37. According to the California Policy Research Center, "70% of the state's paroled felons reoffend within 18 months – the highest recidivism rate in the nation." Joan Petersilia, *Challenges of Prisoner Re-entry and Parole in California,* 12 CPRC (June 2000).

Crawford, 372 F.3d at 1069, fn. omitted (Trott, J., concurring).

The California Legislature has expressly provided that it

> finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. *It is in the interest of public safety for the state to provide for the supervision of and surveillance of parolees,* including the judicious use of revocation actions, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and

> discharge. A sentence pursuant to Section 1168 or 1170 shall include a period of parole, unless waived, as provided in this section.

Cal. Pen. Code § 3000, subd. (a)(1), italics added.

In the context of parole violation hearings, this Court has said:

> In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements. The State thus has an "overwhelming interest" in ensuring that a parolee complies with those requirements and is returned to prison if he fails to do so. 408 U.S. at 483. ...The costs of allowing a parolee to avoid the consequences of his violation are compounded by the fact that parolees ... are more likely to commit future criminal offenses than are average citizens. See *Griffin v. Wisconsin*, 483 U.S. 868, 880 .... Indeed, this is the very premise behind the system of close parole supervision. *Ibid.*

Scott, 524 U.S. at 365.

Based on the codified statement expressed in California Penal Code section 3000, subdivision (a)(1), the studies cited in *Crawford*, and this Court's observations with regard to the likelihood of re-offense by a parolee, the special needs of the State to ensure compliance with the conditions of parole and the law, and the protection of society, are compelling.

A. THE SPECIAL NEEDS OF SUPERVISION JUSTIFY A WARRANTLESS AND SUSPICIONLESS SEARCH

The special needs of California's parole system make a warrant requirement "impracticable" and justify a suspicionless search. *Griffin v. Wisconsin* 483 U.S. 868, 876. An immediate on-the-spot search of a parolee is a valuable tool in ensuring that a parolee is abiding by the terms of his parole and more importantly complying with the law. The ability to search a

parolee on-the-spot, without a warrant, also has a dramatic deterrent effect. Every parolee in California is fully aware that if he commits a crime, the risk of being detected is significantly increased by virtue of the fact that law enforcement can act swiftly and immediately.

> [T]he delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct, see *New Jersey v. T.L.O.*, 469 U.S. [325 (1985)], at 340, and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create, see *New York v. Burger*, 482 U.S. at 710; *United States v. Biswell*, 406 U.S. [311 (1972)] at 316.

Griffin v. Wisconsin, 483 U.S. at 876.

The ability to conduct a search of a parolee without individualized suspicion is again an important tool in supervising the parolee and most importantly in protecting the public. The State's special need to closely monitor the parolee, who has a severely diminished privacy right and to protect the public, dictate that such a parolee should be immediately searched without a warrant and regardless of the lack of evidence pointing to the parolee.

> [E]ven more than the requirement of a warrant, a probable-cause requirement would reduce the deterrent effect of the supervisory arrangement. The probationer would be assured that so long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected.

Griffin v. Wisconsin, 483 U.S. at 878.

In the context of suspicionless, random, drug testing of student athletes who are cloaked with the presumption of innocence and who have a much greater expectation of privacy than the parolee, this Court stated:

> As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on *suspicion* of drug use." ... We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. *Skinner, supra,* at 629, n. 9 (collecting cases).

Veronia, 515 U.S. at 663, italics added. A much greater need exists in the context of the parolee. The goal of supervising parolees to ensure that they are abiding the terms of their parole and complying with the law, is most effectively addressed by a warrantless, suspicionless search condition. Given the diminutive privacy right of the parolee, the intrusion is justified by the State's needs, and a *suspicionless* search condition is reasonable and constitutional.

B. THE INCLUSION OF LAW ENFORCEMENT IN THE SEARCH SCHEME IS REASONABLE

The fact that law enforcement officers, in addition to a parole officer, can conduct a warrantless, suspicionless search does not reduce the reasonableness of the search. Firstly, the California Legislature has determined that the exceedingly important task of monitoring parolees and protecting the public, calls for the involvement of law enforcement in addition to parole officers. The number of parolees in the state at any given time exceeds 100,000. *Crawford*, 372 F.3d at 1069 (Trott, J., concurring.) For a single parole officer with a large caseload of parolees, supervision might consist of a mere monthly phone call. The contact that a parolee may encounter with law enforcement, especially if that parolee is engaging in illegal

activities, is an invaluable tool in not only monitoring the parolee's activities, but in deterring illegal conduct.

This Court stated in the context of warrantless, suspicionless administrative searches:

> [W]e fail to see any constitutional significance in the fact that police officers, rather than "administrative" agents are permitted to conduct the § 415-a5 inspection. The significance respondent alleges lies in the role of police officers as enforcers of the penal laws and in the officers' power to arrest for offenses other than violations of the administrative scheme. It is, however, important to note that state police officers, like those in New York, have numerous duties in addition to those associated with traditional police work. See *People v. De Bour*, 40 N.Y.2d 210, 218, 352 N.E.2d 562, 568 (1976) ("To consider the actions of the police solely in terms of arrest and criminal process is an unnecessary distortion"); see also ABA Standards for Criminal Justice 1-1.1(b) and commentary (2d ed. 1980, Supp. 1982). As a practical matter, many States do not have the resources to assign the enforcement of a particular administrative scheme to a specialized agency. So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself. In sum, we decline to impose upon the States the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents.

New York v. Burger, 482 U.S. 691, 717-718, 107 S.Ct. 2636, 96 L.Ed.2d 601, fn. omitted.

Secondly, when a law enforcement officer is aware of the parolee's parole status and therefore is aware of his search condition, the officer's purpose for the search includes

monitoring the conduct of the parolee for compliance with his parole conditions and the law. Regardless of whatever investigative purposes the officer may have in mind, when an officer is aware of the parolee's parole status and search condition, any search that he thereafter conducts carries out the intent of the Legislature that supervision of parolees includes search by law enforcement with or without a warrant or individualized suspicion.[3]

Thirdly, Petitioner's reliance on *Edmond*, 531 U.S. 32, and *Ferguson*, 532 U.S. 67, for the proposition that California's parolee search condition is not justified by the special needs of the State because of its "entanglement with law enforcement", *Brief for Petitioner* at 10, 33-39, is misplaced. In *Edmond*, Indianapolis police set up vehicle checkpoints for the purpose of drug interdiction. *Edmond*, 531 U.S. at 34-36. In *Ferguson*, hospital personnel were turning over positive drug test results of pregnant women to law enforcement, a program which prosecutors and law enforcement were instrumental in helping to set up. *Ferguson*, 532 U.S. at 70-72. Both of these searching schemes were aimed at average law-abiding citizens who enjoy the presumption of innocence, engaged in common activities. The search scheme was not aimed at convicted felons recently conditionally released from prison, who are still under the legal authority of the Department of Corrections, and who have no expectation of privacy except to be free from arbitrary, capricious and harassing searches. Thus, *Edmond* and *Ferguson* are clearly distinguishable from the case *sub judice*.

The potential for an arrest by law enforcement and criminal prosecution exists in many of the warrantless, suspicionless search schemes approved by this Court. In *Von*

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3. While not presented by the facts of this case, conversely, when an officer does not know about the parolee's status or the search condition, his purpose in conducting a search is unrelated to the supervision and monitoring of the parolee. Thus, justification for the search is not based upon the special needs of the State to supervise the parolee, rather the search must be reasonable under the totality of the circumstances, with the search condition and any reasonable suspicion known to the officer, being a salient circumstance. *United States v. Knights*, 534 U.S. at 118.

Raab, 489 U.S. 656, *Skinner*, 489 U.S. 602, *Griffin v. Wisconsin*, 483 U.S. 868, *New York v. Burger*, 482 U.S. 691, and *Veronia*, 515 U.S. 646, each of these cases sanctioned warrantless searches that involved the detection of potential penal violations – illegal drug use or operation of a conveyance while under the influence of alcohol. While this Court did not rule on the use of evidence obtained in these searches in criminal cases, the salient factor in each of these cases was not the possible discovery of evidence that could lead to criminal charges, rather the salient factor was that the scheme focused on a specific group with a reduced expectation of privacy. Where a suspicionless search scheme aims at a narrowly defined group with a diminished expectation of privacy, and the needs of the State for a suspicionless search are compelling, suspicionless searches are authorized by the Fourth Amendment. *Cf. Skinner*, 489 U.S. at 627-628, 631.

C. THE PAROLE SEARCH SCHEME NOTIFIES THE PAROLEE OF THE SEARCH CONDITION AND PROHIBITS AN ARBITRARY AND OPPRESSIVE SEARCH

California Penal Code section 3067, subdivision (a), requires that a parolee agree in writing to the search condition; thus, Samson was clearly informed of the condition. Case law and subdivision (d) of section 3067, limit the discretion of law enforcement such that a search may not be arbitrary or oppressive.

> (d) It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment.

Cal. Pen. Code § 3067, subd. (d).

Contrary to Petitioner's assertion, a parolee's protection against arbitrary, capricious and harassing searches is neither "ineffective" nor "inconsistent with this Court's Fourth Amendment decisions." *Brief for Petitioners* at 8, 20-21. This Court has stated that

> [a]n essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents.

Skinner, 489 U.S. at 621-622; *accord, Von Raab*, 489 U.S. at 672, n. 2 ("The procedures prescribed by the Customs Service for the collection and analysis of the requisite samples do not carry the grave potential for 'arbitrary, and oppressive interference with the privacy and personal security of Individuals,' [Citation], that the Fourth Amendment was designed to prevent.") A prohibition against arbitrary and oppressive acts by the Government is a standard used by this Court specifically in suspicionless searches, and in the case of a parolee, such a prohibition is the only residual right of privacy that he retains.

The search of Samson was reasonable under this standard. Samson was on a public street in broad daylight, walking with a woman and baby. J.A. 10. The officer, Rohleder, recognized Samson "from *a* prior contact." J.A. 10, italics added. Officer Rohleder *knew* that Samson was on parole and therefore was subject to a search condition. *People v. Middleton*, 131 Cal.App.4th 732, 740 (2005), (fn. omitted) ("the officers' awareness that [defendant] was a parolee was sufficient to inform them of their right to conduct a parole search").

Officer Rohleder had further heard from other officers that Samson "might have a parolee at large warrant." J.A. 10. Upon making contact with Samson, the officer asked Samson if he had a warrant out. J.A. 10. Samson verified for the officer that he indeed *did* have a warrant out, but that he had taken care of it. J.A. 10. Officer Rohleder then conducted a parole search of Samson, at which time the officer found methamphetamine inside a cigarette box. Samson was then placed under arrest. Officer Rohleder expressly testified that he conducted the search for the purpose of making "sure he's still obeying the laws." J.A. 10.

Officer Rohleder had but one prior contact with Samson. When he saw Samson he recognized him and remembered that other officers had told him Samson had a warrant out – information that Samson verified. Officer Rohleder contacted Samson and asked him about the warrant. Satisfied that there was no warrant, Officer Rohleder proceeded to conduct a search of Samson pursuant to Samson's parole condition, for the express purpose of verifying that he was complying with his conditions of parole. The fact that Samson recently cleared a parolee-at-large warrant would indicate that Samson, though now in compliance with the terms of his parole, recently had been out of compliance. The search was therefore *not* arbitrary and it was not oppressive, harassing or capricious. Further the search successfully accomplished what the parole condition was designed to do and what the Legislature intended when the condition was drafted – determine if Samson was abiding by the conditions of his parole and the law. He was not.

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//

CONCLUSION

Except for the incarcerated felon, there is no group entitled to a lesser expectation of privacy than the parolee. The State has a compelling need to closely supervise the parolee and to protect the public. This special need of the State is significantly furthered by a warrantless and suspicionless search condition that would be jeopardized by the imposition of a reasonable suspicion standard. The privacy interest of the parolee is exceptionally minimal while the special needs of the State to ensure that the parolee is abiding by the terms of his parole and complying with the law are extremely compelling. The special needs of the State overwhelmingly outweigh the minimal privacy rights of the parolee, and a warrantless search of a parolee without individualized suspicion is reasonable under the Fourth Amendment.

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Supreme Court, U.S.
FILED
NOV 28 2005
OFFICE OF THE CLERK

No. 04-9728

IN THE

Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of California, First Appellate District

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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November 28, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Does the Fourth Amendment prohibit police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. CALIFORNIA'S STANDARD DEPARTS FROM THE PRACTICES OF ITS SISTER STATES	3
A. Parole Conditions Generally	3
B. California's Suspicionless Searches	5
II. CALIFORNIA'S COURTS HAVE FAILED TO OFFER A SATISFACTORY JUSTIFICATION FOR ITS PAROLE SEARCH DOCTRINE BECAUSE ONE DOES NOT EXIST	10
A. California's Interests In Deterring Crime And Protecting The Public Do Not Justify Warrantless, Suspicionless, Discretionary Searches Of Parolees	10
B. The Status Of Parolees	11
1. Consent	12
2. Parolees Are Not Prisoners	13
3. The Act-Of-Grace Theory	15
C. General Warrants Rejected	16
D. The Rights Of Others	18

TABLE OF CONTENTS—continued

Page

III. THE REASONABLE SUSPICION STANDARD IS THE LEAST RESTRICTIVE MEANS TO PROTECT THE FOURTH AMENDMENT INTERESTS AT ISSUE 20

CONCLUSION 22

TABLE OF AUTHORITIES

CASES Page

Allan v. *State*, 746 P.2d 138 (Nev. 1987)..... 6
Bond v. *United States*, 529 U.S. 334 (2000) 1
Brinegar v. *United States*, 338 U.S. 160 (1949) 11
Bumper v. *North Carolina*, 391 U.S. 543 (1968).... 12
Carroll v. *United States*, 267 U.S. 132 (1925)..... 8
Escoe v. *Zerbst*, 295 U.S. 490 (1935) 16
Gagnon v. *Scarpelli*, 411 U.S. 778 (1973)..... 16
Horton v. *California*, 496 U.S. 128 (1990)..... 20
Hudson v. *Palmer*, 468 U.S. 517 (1984)..... 13, 14
Illinois v. *Caballes*, 125 S. Ct. 834 (2005)..... 1
Kyllo v. *United States*, 533 U.S. 27 (2001) 1
Maryland v. *Wilson*, 519 U.S. 408 (1997) 19
Moreno v. *Baca*, 400 F.3d 1152 (9th Cir. 2005)..... 6, 8
Morrissey v. *Brewer*, 408 U.S. 471 (1972) .. 3, 13, 14, 16
New Jersey v. *T.L.O.*, 469 U.S. 325 (1985)..... 8
Owens v. *Kelley*, 681 F.2d 1362 (11th Cir. 1982)..... 6
Pena v. *State*, 792 P.2d 1352 (Wyo. 1990)..... 6
People v. *Burgener*, 714 P.2d 1251 (Cal. 1986), *overruled on other grounds by People* v. *Reyes*, 968 P.2d 445 (Cal. 1998)..... 11, 12, 14
People v. *Edwards*, 557 P.2d 995 (Cal. 1976).....11, 16
People v. *Lampitok*, 798 N.E.2d 91 (Ill. 2003)..... 7
People v. *Reyes*, 968 P.2d 445 (Cal. 1998).....*passim*
People v. *Samson*, 2004 WL 2307111 (Cal. Ct. App. Oct. 14, 2004), *cert. granted*, 74 U.S.L.W. 3199 (U.S. Sept. 27, 2005) (No. 04-9728)..... 8
People v. *Slusher*, 844 P.2d 1222 (Colo. Ct. App. 1992)..... 6
People v. *Woods*, 535 N.W.2d 259 (Mich. Ct. App. 1995)..... 6
Riley v. *Commonwealth*, 120 S.W.3d 622 (Ky. 2003)..... 6

TABLE OF AUTHORITIES—continued

	Page
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973)	12
State v. *Ashley*, 459 N.W.2d 828 (S.D. 1990)	6
State v. *Bonner*, 811 So. 2d 1151 (La. Ct. App. 2002)	6
State v. *Fields*, 686 P.2d 1379 (Haw. 1984)	7
State v. *Massey*, 913 P.2d 424 (Wash. Ct. App. 1996)	6
State v. *Maurstad*, 647 N.W.2d 688 (N.D. 2002)	7
State v. *Perbix*, 331 N.W. 2d 14 (N.D. 1983), *overruled in irrelevant part by State* v. *Maurstad*, 647 N.W.2d 688 (N.D. 2002)	7
State v. *Smith*, 589 N.W.2d 546 (N.D. 1999)	7
State v. *West*, 517 N.W.2d 482 (Wis. 1994)	6
State ex rel. Corgan v. *King*, 868 P.2d 743 (Okla. Crim. App. 1994)	5, 6
Terry v. *Ohio*, 392 U.S. 1 (1968)	7, 20
Thornton v. *United States*, 541 U.S. 615 (2004)	1
United States v. *Bennett*, 2005 WL 2709572 (W.D.N.Y. Oct. 21, 2005)	6
United States v. *Bradley*, 571 F.2d 787 (4th Cir. 1978)	7
United States v. *Crawford*, 323 F.3d 700 (9th Cir.), *vacated*, 343 F.3d 961 (9th Cir. 2003), *reaching same result on other grounds*, 372 F.3d 1048 (9th Cir. 2004)	13
United States v. *Crew*, 345 F. Supp. 2d 1264 (D. Utah 2004)	6, 8
United States v. *Giannetta*, 909 F.2d 571 (1st Cir. 1990)	7
United States v. *Knights*, 534 U.S. 112 (2001)	20
United States v. *Lewis*, 71 F.3d 358 (10th Cir. 1995)	6
United States v. *Martinez-Fuerte*, 428 U.S. 543 (1976)	8

TABLE OF AUTHORITIES—continued

Page

United States v. *Payne*, 181 F.3d 781 (6th Cir. 1999) 6
United States v. *Scott*, 678 F.2d 32 (5th Cir. 1982) 7
United States v. *Williams*, 417 F.3d 373 (3d Cir. 2005) 6
Whren v. *United States*, 517 U.S. 806 (1996) 20

CONSTITUTION, STATUTES AND REGULATIONS

Ala. Code § 15-22-29 3
Alaska Stat. § 33.16.150 3
Ariz. Rev. Stat. Ann. § 31-411 3
Ark. Code Ann. § 16-206 3
Cal. Penal Code § 3053 ..... 3, 4
§ 3056 4
§ 3067(a) 5
Colo. Rev. Stat. § 17-2-201 3
Conn. Gen. Stat. § 54-124a 3
D.C. Code § 1986-14 3
Del. Code Ann. tit. 11, § 4321 3
Fla. Stat. § 947.18 3
Ga. Code Ann. § 42-9-42 3
§ 42-9-44 3
Haw. Rev. Stat. § 353-66 3
Idaho Code Ann. § 20-228 3
730 Ill. Comp. Stat. 5/3-3-7 3
Ind. Code § 11-13-3-4 3
Iowa Code § 45.2(906) 3
Kan. Stat. Ann. § 22-3717 3
Ky. Rev. Stat. Ann. § 439.340 3
La. Rev. Stat. Ann. § 15:574.4 3
Mich. Comp. Laws § 791.236 3
Miss. Code Ann. § 47-7-17 4
Mo. Rev. Stat. § 217.690 4

TABLE OF AUTHORITIES—continued

	Page
N.C. Gen. Stat. § 15A-1374	4
N.D. Cent. Code § 12-59-07	4
N.H. Rev. Stat. Ann. § 651-A:4	4
N.M. Stat. § 31-21-10	4
N.Y. Penal Law § 70.40	4
Neb. Rev. Stat. § 83-1,116	4
Nev. Rev. Stat. § 213.12175	4
Ohio Rev. Code Ann. § 753.10	4
Okla. Stat. tit. 57, § 332.8	4
Or. Rev. Stat. § 144.270	4
61 Pa. Cons. Stat. § 331.23	4
R.I. Gen. Laws § 13-8-16	4
S.C. Code Ann. § 24-21-660	4
S.D. Codified Laws § 24-15A-24	4
Tenn. Code Ann. § 40-28-117	4
Tex. Gov't Code Ann. § 508.221	4
Utah Code Ann. § 77-27-10	4
Va. Code Ann. § 53.1-157	4
Vt. Stat. Ann. tit. 18, § 502b	4
W. Va. Code § 62-12-17	4
Wash. Rev. Code § 72.04A.070	4
Wisc. Stat. § 304.06	4
Wyo. Stat. Ann. § 7-13-402	4
Cal. Code Regs. tit. 15, § 2511(b)	5
tit. 15, § 2512(a)	12
03-208-001 Me. Code R.	3
Md. Code Regs. 12.08.01.21	3
120 Mass. Code Regs. 300.07	3
Minn. R. 2940.2000	3
Mont. Admin. R. 20.7.1101	4
N.J. Admin. Code § 10A:71-6.4	4

TABLE OF AUTHORITIES—continued

SCHOLARLY AUTHORITIES Page

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Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547 (1999)..... 16, 17, 18

5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004)..... 12, 13, 14, 15

Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197 (1993)..... 18

Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 Crime & Just. 479 (1999)..... 3

William R. Rapson, Note, *Extending Search-and-Seizure Protection to Parolees in California*, 22 Stan. L. Rev. 129 (1969)..... 5

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately 35 *amicus curiae* briefs each year on various issues in this Court and other courts, including many cases involving the Fourth Amendment. See *Illinois* v. *Caballes*, 125 S. Ct. 834 (2005); *Thornton* v. *United States*, 541 U.S. 615 (2004); *Kyllo* v. *United States*, 533 U.S. 27 (2001); *Bond* v. *United States*, 529 U.S. 334 (2000).

SUMMARY OF THE ARGUMENT

This case presents the question whether the Fourth Amendment permits law enforcement officers to conduct warrantless, suspicionless searches of parolees at any time and at any place, regardless of the privacy interests of others nearby, solely because that person has the status of a parolee.

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[1] Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Respondent State of California has taken a crabbed and ahistorical view of Fourth Amendment protections that would grant unfettered discretion to officers to conduct searches of the persons, homes and effects of parolees and their families. According to California, the Fourth Amendment's "reasonableness" requirement is fully consistent with a policy that gives police officers unchecked authority to "search first, and ask questions later."

California's peculiar understanding of what constitutes a "reasonable" exercise of authority by an officer conflicts with the practices of many of its sister States, which provide some meaning to the reasonableness requirement by demanding that searches of parolees be based at least upon an articulable suspicion. California's position also conflicts with numerous decisions of both State and federal courts. As many of these courts have recognized, parolees may have a diminished expectation of privacy in light of the State's legitimate interests in the protection of citizens and the deterrence of further crime. But parolees live among us in our communities as part of their rehabilitation, and the State's general interests cannot justify a unique grant of authority that is anathema to a free society.

NACDL's mission is to defend those accused of crime and to ensure that constitutional protections in the criminal justice system are strictly construed and honored. NACDL and its members are familiar with the practices in all 50 States and the District of Columbia with respect to parole and probation. From this unique perspective, NACDL seeks to call the Court's attention to three issues of significant importance: first, the degree to which California's proposed practice is at variance with that of other jurisdictions; second, the absence of any justification for California's position; and third, the need for a reasonable suspicion standard as the only sensible check on police powers in this context.

ARGUMENT

I. CALIFORNIA'S STANDARD DEPARTS FROM THE PRACTICES OF ITS SISTER STATES.

No other State has adopted California's practice of allowing any officer to conduct a suspicionless search of the person, home or effects of any parolee at any time and for any reason, excepting only searches somehow deemed to be "arbitrary, capricious or harassing." Instead, most States impose an express "reasonable suspicion" standard. Even the courts of the one State (North Dakota) that has concurred with California that a broad "reasonableness" standard applies have nonetheless taken pains to point out that reasonable suspicion existed for the challenged searches in any event. And no State has upheld the type of random, intrusive search that occurred in this instance upon a sidewalk while Petitioner was walking with his companion and her child.

A. Parole Conditions Generally.

In the United States, parole is a well-established penological tool used to rehabilitate and reintegrate offenders into society. See *Morrissey* v. *Brewer*, 408 U.S. 471, 477-78 (1972) (discussing the purpose of parole); Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 Crime & Just. 479, 487-92 (1999). To achieve these goals, States have enacted regulatory frameworks governing parole, which, in part, permit parole boards to impose broad conditions of release upon parolees.[2] The conditions imposed are often

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[2] *See* Ala. Code § 15-22-29; Alaska Stat. § 33.16.150; Ariz. Rev. Stat. Ann. § 31-411; Ark. Code Ann. § 16-206; Cal. Penal Code § 3053; Colo. Rev. Stat. § 17-2-201; Conn. Gen. Stat. § 54-124a; Del. Code Ann. tit. 11, § 4321; D.C. Code § 1986-14; Fla. Stat. § 947.18; Ga. Code Ann. § 42-9-42, -44; Haw. Rev. Stat. § 353-66; Idaho Code Ann. § 20-228; 730 Ill. Comp. Stat. 5/3-3-7; Ind. Code § 11-13-3-4; Iowa Code § 45.2(906); Kan. Stat. Ann. § 22-3717; Ky. Rev. Stat. Ann. § 439.340; La. Rev. Stat. Ann. § 15:574.4; 03-208-001 Me. Code R.; Md. Code Regs. 12.08.01.21; 120 Mass. Code Regs. 300.07; Mich. Comp. Laws § 791.236; Minn. R.

similar from State to State. Thus, significant deviations—such as the one at issue here—raise sensible concerns about improper State infringement upon parolees' constitutional rights.

California's general approach to parole and to parole boards is similar to that in other States. California maintains extensive supervisory powers over parolees and retains the right to revoke parole if the conditions imposed are violated. See Cal. Penal Code § 3056 ("Prisoners on parole shall remain under the legal custody of the department [of corrections] and shall be subject at any time to be taken back within the inclosure of the prison."). Like other States, California gives broad discretion to its parole board by providing that "[t]he Board of Prison Terms upon granting any parole to any prisoner may also impose on the parole any conditions that it may deem proper." *Id.* § 3053(a).

Generally, parole boards have the authority to apply a set of universal, mandatory release conditions, in addition to any special restrictions tailored to an individual parolee's particular circumstances.[3] Among these restrictions are so-called "search conditions." Most such conditions require a parolee to submit to searches of his person, his property, or

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2940.2000; Miss. Code Ann. § 47-7-17; Mo. Rev. Stat. § 217.690; Mont. Admin. R. 20.7.1101; Neb. Rev. Stat. § 83-1,116; Nev. Rev. Stat. § 213.12175; N.H. Rev. Stat. Ann. § 651-A:4; N.J. Admin. Code § 10A:71-6.4; N.M. Stat. § 31-21-10; N.Y. Penal Law § 70.40; N.C. Gen. Stat. § 15A-1374; N.D. Cent. Code § 12-59-07; Ohio Rev. Code Ann. § 753.10; Okla. Stat. tit. 57, § 332.8; Or. Rev. Stat. § 144.270; 61 Pa. Cons. Stat. § 331.23; R.I. Gen. Laws § 13-8-16; S.C. Code Ann. § 24-21-660; S.D. Codified Laws § 24-15A-24; Tenn. Code Ann. § 40-28-117; Tex. Gov't Code Ann. § 508.221; Utah Code Ann. § 77-27-10; Vt. Stat. Ann. tit. 18, § 502b; Va. Code Ann. § 53.1-157; Wash. Rev. Code § 72.04A.070; W. Va. Code § 62-12-17; Wisc. Stat. § 304.06; Wyo. Stat. Ann. § 7-13-402.

[3] The conditions imposed are then set forth in parole forms, the specific content of which varies from state to state and from parolee to parolee. Amicus App. 1a-10a.

both, either without a warrant or expressly upon reasonable suspicion.[4] California's "Notice and Conditions of Parole," for example, informs parolees that "You and your residence and any property under your control may be searched without a warrant by an agent of the Department of Corrections or any law enforcement officer." Amicus App. 1a; see also Cal. Code Regs. tit. 15, § 2511(b). However, the California Penal Code also provides that parolees must agree to warrantless searches "with or without cause." Cal. Penal Code § 3067(a)

B. California's Suspicionless Searches.

Based upon this statutory and regulatory framework, California courts have permitted suspicionless searches of parolees. *People* v. *Reyes*, 968 P.2d 445, 450 (Cal. 1998) (allowing police and parole officers to search parolees without individualized suspicion so long as the search is not "arbitrary, capricious or harassing"). In so doing, California goes against the "the vast majority of jurisdictions that have considered this issue," and which have held that warrantless searches are only permissible when supported by reasonable suspicion. *Reyes*, 968 P.2d at 453 (Kennard, J., dissenting); see also *State ex rel. Corgan* v. *King*, 868 P.2d 743, 746 (Okla. Crim. App. 1994) (noting that the "majority of states that have addressed this issue agree that probable cause is not necessary to justify a warrantless search of a parolee's home,"

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[4] In broad overview, these restrictions fall into one of four categories. First, some parole forms do not contain an explicit search condition, but do contain a catch-all provision allowing imposition of "special conditions" at the court/officer's discretion. Amicus App. 3a, 10a. Second, other forms contain a blanket search condition that does not identify under what terms a search may be conducted. *Id.* at 4a, 7a. Third, still other States require parolees to submit to warrantless searches. *Id.* at 1a, 8a. Fourth and finally, several States require parolees to submit to searches only where the searching officer has reasonable suspicion of a parole violation. *Id.* at 5a, 9a.

but that they do "requir[e] reasonable grounds to exist in order for a warrantless search to be valid").[5]

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[5] The weight of authority on this issue clearly and consistently forbids suspicionless searches of parolees. *See Moreno* v. *Baca*, 400 F.3d 1152, 1163 (9th Cir. 2005); *United States* v. *Williams*, 417 F.3d 373, 376 n.2 (3d Cir. 2005) (interpreting Pennsylvania's parole condition permitting warrantless searches "'to include an implicit requirement that any search be based on reasonable suspicion'") (quoting *United States* v. *Baker*, 221 F.3d 438, 448 (3d Cir. 2000)); *United States* v. *Payne*, 181 F.3d 781, 787 (6th Cir. 1999) (requiring that a parole search be supported by at least reasonable suspicion); *United States* v. *Lewis*, 71 F.3d 358, 361-62 (10th Cir. 1995); *United States* v. *Bennett*, 2005 WL 2709572, at *4 (W.D.N.Y. Oct. 21, 2005) (finding that the New York State Division of Parole Policy & Procedure Manual requires reasonable suspicion for parolee searches); *United States* v. *Crew*, 345 F. Supp. 2d 1264, 1266 (D. Utah 2004); *Riley* v. *Commonwealth*, 120 S.W.3d 622, 627 (Ky. 2003); *State* v. *West*, 517 N.W.2d 482, 484 n.2 (Wis. 1994) (noting that although Wisconsin parolees are subject to warrantless searches, those searches are proper if an officer has "reasonable grounds to believe that the client" is in possession of contraband); *Pena* v. *State*, 792 P.2d 1352, 1357-58 (Wyo. 1990); *State* v. *Ashley*, 459 N.W.2d 828, 830 (S.D. 1990) (stating that although parolees are subject to a warrantless search condition, the condition limited searches to those supported by "reasonable cause . . . ascertained by a parole agent"); *Allan* v. *State*, 746 P.2d 138, 140 (Nev. 1987) (per curiam) (ruling that a parole search must be founded on reasonable belief that "a violation of a parole agreement has occurred"); *State* v. *Bonner*, 811 So. 2d 1151, 1153-54 (La. Ct. App. 2002); *State* v. *Massey*, 913 P.2d 424, 425 (Wash. Ct. App. 1996); *People* v. *Woods*, 535 N.W. 2d 259, 261-62 (Mich. Ct. App. 1995); *King*, 868 P.2d at 745, 746 (ruling that although Oklahoma subjects parolees to searches "'at any time or place,'" state regulations require "reasonable grounds to believe that the offender is keeping contraband" before conducting a search); *People* v. *Slusher*, 844 P.2d 1222, 1225 (Colo. Ct. App. 1992) (stating that a parole search must be predicated on "reasonable grounds to believe that a parole violation has occurred"). *But see Owens* v. *Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982) (permitting probation searches without individualized suspicion); *Reyes*, 968 P.2d at 451.

Given that some jurisdictions make no distinction between parolees and probationers for Fourth Amendment purposes, cases involving probation searches are relevant here. *See, e.g.*, *Williams*, 417 F.3d at 376 n.1 (stating "'there is no constitutional difference between probation and

Even in the rare instance where a court has upheld suspicionless searches as theoretically permissible, the court was at pains to point out that the search was, in fact, supported by reasonable suspicion. See *State* v. *Smith*, 589 N.W.2d 546, 549-50 (N.D. 1999) (holding that probationary searches need not be based on reasonable suspicion, but then finding that "the reasonable suspicion standard was met here"). The need for a court to bolster its decision with alternative findings on reasonable suspicion strongly suggests that the core holding offering no limitation at all on officer discretion is constitutionally infirm.[6]

This Court has consistently demanded cognizable and meaningful levels of suspicion when granting limited exceptions to the warrant requirement. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 18 (1968) (permitting warrantless pat-down

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parole for purposes of the [F]ourth [A]mendment'") (quoting *United States* v. *Hill*, 967 F.2d 902, 909 (3d Cir. 1992)). As such, probation cases requiring reasonable suspicion help inform the analysis in this case. *United States* v. *Giannetta*, 909 F.2d 571, 576 (1st Cir. 1990) (upholding a probation search "so long as the decision to search was in fact narrowly and properly made on the basis of reasonable suspicion"); *United States* v. *Scott*, 678 F.2d 32, 35 (5th Cir. 1982); *United States* v. *Bradley*, 571 F.2d 787, 790 n.4 (4th Cir. 1978); *People* v. *Lampitok*, 798 N.E.2d 91, 106 (Ill. 2003); *State* v. *Fields*, 686 P.2d 1379, 1390 (Haw. 1984) (requiring, where a probation condition forced probationers to submit to warrantless searches, that those searches be "justified by a reasonable suspicion supportable by specific and articulable facts").

[6] Indeed, North Dakota law appears unsettled on this point. *Compare State* v. *Maurstad*, 647 N.W.2d 688, 696 (N.D. 2002) (declining to "apply our prior case law holding reasonable suspicion or probable cause is unnecessary for a probationary search to be valid," because such searches are valid whenever "a probationary search authorized by a condition of probation is supported by reasonable suspicion"), *with State* v. *Perbix*, 331 N.W. 2d 14, 21-22 (N.D. 1983) (permitting warrantless searches of probationers without individualized suspicion so long as the searches are reasonable), *overruled in irrelevant part by State* v. *Maurstad*, 647 N.W.2d 688 (N.D. 2002). As will be discussed below, the justification for such suspicionless searches is grossly overbroad.

searches for officer safety only where supported by reasonable suspicion); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 347 (1985) (permitting warrant-less searches with less than probable cause only where the state has a special need); *Carroll* v. *United States*, 267 U.S. 132, 160 (1925) (permitting warrantless searches of moving vehicles only where the search is supported by probable cause); see also *Moreno* v. *Baca*, 400 F.3d 1152, 1163 n.7 (9th Cir. 2005) (noting that "'special needs'" cases permitting warrantless searches with less than probable cause "have required individualized suspicion in order to conduct targeted searches of individuals"); *United States* v. *Crew*, 345 F. Supp. 2d 1264, 1266 (D. Utah 2004) (holding that parole searches were a "special need[]" and could be conducted without a warrant, but only if those searches were based on reasonable suspicion). Thus, "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976). Any "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy'" is protected by more than an officer's discretion. *T.L.O.*, 469 U.S. at 342 n.8 (quoting *Delaware* v. *Prouse*, 440 U.S. 648, 654-55 (1979)). California's suspicionless parole searches do not provide those "other safeguards."

In its *Reyes* decision (followed in the decision at issue here), the California Supreme Court sought to provide some minimal protection to parolees, in the form of a prohibition on searches of parolees that are "arbitrary, capricious or harassing." *Reyes*, 968 P.2d at 450; *People* v. *Samson*, 2004 WL 2307111, at *2-*3 (Cal. Ct. App. Oct. 14, 2004). This standard, however, collapses into a nullity for two reasons. First, this prohibition is easily avoided by a simple claim—as was made here—that the officer conducted the search as part

of his or her more general duties of protecting public safety. J.A. 38. So long as an officer can provide a "rehabilitative, reformative, or legitimate law enforcement purpose[]" for the search, the courts will uphold it. *Reyes*, 968 P.2d at 450. As Petitioner notes, this standard "does not significantly limit the discretion of law enforcement officers to search parolees." Pet. Br. 22. Indeed, no California court has ever excluded the fruit of such searches because they were arbitrary, capricious or harassing. *Id.* Second, the standard is patently meaningless if the facts as stated here satisfy it. Here, the search conducted is the definition of arbitrary—Officer Rohleder admitted that he does not does not "go after [every parolee] all the time" and offered no explanation for the search other than that Petitioner was a parolee. J.A. 38-39. A standard that ratifies searches based upon nothing more than an officer's peculiar schedule and whim cannot reasonably be described as anything other than arbitrary. On its own terms, then, California's attempt to satisfy some Fourth Amendment concerns fails entirely.[7]

By rejecting this reasonable suspicion standard, California has veered from the body of case law in the State and federal courts that recognizes that, despite their lessened expectations of privacy, parolees are still entitled to Fourth Amendment protection and should not be subjected to suspicionless searches at the whim of any law enforcement officer. Given the importance of Fourth Amendment protections and the weight of authority opposing California's decision to relax those protections, it is particularly important that this Court invalidate suspicionless searches of parolees and reject California's practice.

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[7] Any additional protection that California might argue it has provided by requiring that suspicionless searches be "reasonable" is illusory. By defining reasonableness as being that which is not "arbitrary, capricious or harassing," but failing to give real meaning to those terms, California has eviscerated the protections of the Fourth Amendment for parolees.

II. CALIFORNIA'S COURTS HAVE FAILED TO OFFER A SATISFACTORY JUSTIFICATION FOR ITS PAROLE SEARCH DOCTRINE BECAUSE ONE DOES NOT EXIST.

Warrantless, suspicionless, discretionary parole searches are not justified by reference to California's interests in deterring crime and protecting the public. Neither are such searches justified by parolees' express or implied consent or constructive custody.

A. California's Interests In Deterring Crime And Protecting The Public Do Not Justify Warrantless, Suspicionless, Discretionary Searches Of Parolees.

In *Reyes*, the Supreme Court of California recognized that parole plays a critical correctional purpose; specifically, it is "granted for the specific purpose of monitoring [a parolee's] transition from inmate to free citizen." 968 P.2d at 450. Accordingly, the conditional freedom of parole serves the dual purpose of rehabilitating convicts and protecting the public from future crimes. *Id.* Indeed, California "has a duty not only to assess the efficacy of its rehabilitative efforts but to protect the public." *Id.* Considering California's interests in rehabilitation and protection, the *Reyes* court concluded "the purpose of the search condition is to deter the commission of crimes and to protect the public." *Id.* at 451. As such, "the importance of the latter interest justifies the imposition of a warrantless search condition." *Id.* at 450. That was because deterrence and protection are "enhanced by the potential for random searches." *Id.* at 451.

To be sure, a regime of "random searches" of parolees might "deter the commission of crimes" and "protect the public," but that argument proves far too much. Such an argument might also justify random searches of dwellings in high crime areas or random searches of corporate boardrooms whenever earnings are restated. An appeal to such general

interests sweeps so broadly as to justify random, suspicionless searches in nearly any cognizable context or community where crime has previously occurred. California steadfastly refuses to recognize that these are the very same arguments used to justify a police state. See *Brinegar* v. *United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) ("Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."). Persons living in a free society enjoy robust privacy interests that are protected both by *ex ante* procedures (valid warrants, probable cause requirements) as well as *post hoc* remedial measures (exclusionary remedies, limited civil actions). These protections necessarily clash with the interests of public safety and even deterrence. Accordingly, the question is not whether a regime of suspicionless, nonconsensual searches would promote deterrence and protection—as surely it must; instead, the question is whether such a regime is consonant both with the status of parolees and the origins and purpose of Fourth Amendment protections.

B. The Status Of Parolees.

California's unique posture with respect to its parole search doctrine is at odds with its own case law recognizing that parolee status does not extinguish all Fourth Amendment rights. In particular, California courts have explicitly rejected the express consent, constructive custody, and act-of-grace theories. *Reyes*, 968 P.2d at 448 (rejecting express consent theory); *People* v. *Burgener*, 714 P.2d 1251, 1266-67 (Cal. 1986) (declining to justify suspicionless search by relying on custody theory to analogize parolees to incarcerated prisoners), *overruled on other grounds by People* v. *Reyes*, 968 P.2d 445 (Cal. 1998); *People* v. *Edwards*, 557 P.2d 995, 999 (Cal. 1976) (recognizing that the act-of-grace theory is now defunct). This Court should likewise reject each theory as invalid.

1. Consent.

Compulsory parole conditions cannot serve as consent to engage in otherwise unreasonable searches. Fourth Amendment rights (like other constitutional rights) may be waived, and a search rendered permissible where an individual gives knowing, intelligent, and voluntary consent. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973) (holding that "a search conducted pursuant to a valid consent is constitutionally permissible"); see also *Bumper* v. *North Carolina*, 391 U.S. 543, 548-49 (1968) (explaining that consent is not "freely and voluntarily given" without showing "more than acquiescence to a claim of lawful authority"). But California's parole form waivers are not voluntary, and thus cannot be the basis of a "consent" search.

California's regulatory framework expressly states that parole conditions cannot be construed as a contract between parolees and the State. Cal. Code Regs. tit. 15, § 2512(a) ("The parole conditions are not a contract but are the specific rules governing all parolees whether or not the parolee has signed the form containing the parole conditions."). That is because prisoners have no choice in the matter: in California, parole is mandatory. *Reyes*, 968 P.2d at 448. In other words, *every* prisoner in California becomes a parolee upon release from incarceration; there is no other way in which a prisoner can leave prison Without choice, there can be no voluntary consent to inclusion of the search condition." *Id.*; see also *Burgener*, 714 P.2d at 1266 n.12 (explaining "the parolee's acceptance of parole under the determinate sentencing law is in no sense pursuant to a voluntary agreement by which he has waived his right to privacy in exchange for release on parole").

Scholarly authority accords with California law in its criticism of the contractual waiver theory. Professor Wayne LaFave contends that the "notion that these waivers are unquestionably voluntary" is "a remarkable one to say the least." 5 Wayne R. LaFave, *Search and Seizure: A Treatise*

on the Fourth Amendment § 10.10(b), at 440-41 (4th ed. 2004). Even with respect to probation, Professor LaFave argues that "to speak of consent ... is to resort to a 'manifest fiction,' for 'the probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse, and the waiver cannot be said to be voluntary in any generally-accepted sense of the term.'" *Id.* (footnote omitted). In this case, of course, the prisoner has *no* "option to refuse," genuine or otherwise, given that California has made parole mandatory – with the result that it is impossible to "speak of consent" in any meaningful way.

The constitutional peril that would attend a rule of law that treated mandatory parole conditions as contractual waivers is both obvious and ominous. Under that theory, a State could attach any requirement it wished to mandatory parole, and thus to all citizens who had at one time been incarcerated. All such citizens, in other words, "could be forced to waive all constitutional rights, including the right to due process in revocation proceedings, or even the right to trial on any new offense allegedly committed during the parole period." *United States* v. *Crawford*, 323 F.3d 700, 718 (9th Cir.), *vacated*, 343 F.3d 961 (9th Cir. 2003), *reaching same result on other grounds*, 372 F.3d 1048 (9th Cir. 2004) (en banc). California has pointed to nothing that would justify such an anomalous and extraordinary result.

2. Parolees Are Not Prisoners.

With respect to the Fourth Amendment, parolees should not be equated with prisoners. Parolees are unlike prisoners, who do not have any Fourth Amendment rights. *Hudson* v. *Palmer*, 468 U.S. 517, 525-26 (1984). Instead of leading highly compartmentalized and rigorously structured lives, parolees' daily affairs more closely resemble those of ordinary free citizens. Even though this Court has held that parolees have *diminished* Fourth Amendment rights, *Morrissey*, 408 U.S. at 480 (stating that parolees are deprived of the "absolute liberty to which every citizen is entitled," and

can claim only "the conditional liberty properly dependent on observance of special parole restrictions"), that is a far cry from holding their Fourth Amendment rights are *extinguished* altogether.

This Court has unequivocally rejected the proposition that the limited Fourth Amendment rights of parolees can be equated to those extinguished rights of prisoners. Whereas in the prison context, this Court found that the Fourth Amendment simply "does not apply within the confines of the prison cell," *Hudson*, 468 U.S. at 525-26, the Court has long observed in the parole context that, "[t]hough the State properly subjects [a parolee] to many restrictions not applicable to other citizens, *his condition is very different from that of confinement in a prison*," *Morrissey*, 408 U.S. at 482 (emphasis added). Consistent with *Hudson*'s analysis, California has also rejected the constructive custody theory. *Burgener*, 714 P.2d at 1266-67.

Scholars universally criticize the notion that parolees can be equated with prisoners with respect to their Fourth Amendment rights. As an initial matter, the first "difficulty with the constructive custody concept is that it is more a conclusion than a theory, and thus can be employed to justify virtually any search of a parolee." 5 LaFave, *supra*, § 10.10(a), at 435-36. Professor Welsh White has criticized the custody theory's premise of equating parolees to prisoners, and suggested a more appropriate legal lens would be the "unconstitutional conditions doctrine." Welsh S. White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. Pitt. L. Rev. 167, 178-81 (1969). As a factual matter, parolees bear very little similarity to prisoners.[8] While the circumstances of prison necessitate

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[8] The differences between parolees and prisoners include the following: The parolee is not incarcerated; he is not subjected to a prison regimen, to the rigors of prison life and the unavoidable company of sociopaths. He does not live in a society whose violent, though

"severe deprivation of [F]ourth [A]mendment rights" because, absent frequent suspicionless searches, "the possibility of riots or attempts to escape might be substantially increased," *id.* at 180, parolees obviously do not live in those same circumstances. Accordingly, Professor White concludes "one cannot blithely maintain that for Fourth Amendment purposes, the two groups of citizens may be treated the same." *Id.*

In short, there is no factual or theoretical basis for treating parolees like prisoners for Fourth Amendment purposes, or for using a comparison between the two groups to validate suspicionless searches of parolees.

3. The Act-Of-Grace Theory.

Finally, the act-of-grace theory does not justify completely depriving parolees of their Fourth Amendment rights. This theory is a corollary to the contractual waiver theory. Whereas the contractual waiver approach might be described as a kind of *express* waiver, the act-of-grace theory "might be described as contemplating an *implied* waiver of Fourth Amendment rights arising from acceptance of the 'privilege' of probation or parole." 5 LaFave, *supra*, § 10.10(b), at 438 (emphasis added).

> usually repressed, mores necessitate iron bars and the close watch of armed guards. Routine searches are necessary in prison to prevent dangerous riots and internal violence. . .. A parolee, however, lives in a different environment, one where such problems are absent and searches and seizures are intrusive. The parolee lives among people who are free to come and go when and as they wish. Except for the conditions of parole, he is one of them. His parole represents supervision, rather than repression; and his parole officer is, ideally, an advisor, rather than an armed watchman. If the parole officer is to be the parolee's personal prison guard, it is only because the court decides that he is, and such a decision stands on extraordinarily shaky ground.

William R. Rapson, Note, *Extending Search-and-Seizure Protection to Parolees in California*, 22 Stan. L. Rev. 129, 133 (1969) (footnote omitted).

This Court, however, has already discredited the act-of-grace theory. Compare *Escoe* v. *Zerbst*, 295 U.S. 490, 492-93 (1935) (stating "[p]robation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose"), with *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 n.4 (1973) (finding that "a probationer can no longer be denied due process, in reliance on the dictum in *Escoe* v. *Zerbst*, that probation is an 'act of grace'") (citation omitted). The Court has explained that "[i]t is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." *Morrissey*, 408 U.S. at 482. The Supreme Court of California has reached the same result. *Edwards*, 557 P.2d at 999 (recognizing that "the traditional view that a grant of probation is a privileged act of grace or clemency has been discredited in favor of the modern view that such a grant would be deemed an alternative form of punishment in those cases when it can be used as a correctional tool"). As such, any reliance on the "act of grace" doctrine to justify suspicionless searches is improper.

C. General Warrants Rejected.

California's parole search doctrine confers a general warrant upon officers to search the persons, homes and effects of parolees, subject only to a non-harassment condition. The Fourth Amendment embodies the Framers' hostility to precisely such grants of authority to officers. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 578 (1999) (explaining that the "delegation of discretionary authority to ordinary, 'petty,' or 'subordinate' officers was anathema to framing-era lawyers")[9]. The Framers' particular concern with the

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[9] A general warrant was "a framing-era term for an unparticularized warrant (for example, ordering a search of 'suspected places'), which was

substance of general warrants was much the same as expressed here—the perceived need to limit the broad discretion of officers to conduct intrusive searches of homes and to thereby disrupt the privacy of the residents and the community's sense of ordered liberty. See William J. Cuddihy, *The Fourth Amendment: Origins and original meaning, 602-1791*, at 237 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Services) ("[G]eneral searches and warrants ... furnished an infinite power of surveillance to searchers that exposed every Englishman's dwelling to perpetual, capricious intrusion.").

As here, the general warrant required no showing of cause and delineated no specific boundaries. Davies, *supra*, at 558. It conferred upon common officers essentially unlimited power to search and arrest at their discretion. The Framers found this nearly unmitigated authority especially pernicious given their general distrust of the judgment of common officers. As a result, the search restrictions that ultimately became the Fourth Amendment were a central feature of the compromise between the Federalists and the Anti-federalists that made way for the new federal charter. See generally Davies, *supra*, at 609-11; see also Cuddihy, *supra*, at 1365-79. So strong was the acclamation for such a provision that it was already a feature of many State constitutions at the time the Framers drafted our Constitution. See Cuddihy, *supra*, at 1233-54, 1298-341, 1347-51 (discussing search and seizure in state constitutions). Accordingly, any conferral of the type of authority represented by California's parole search doctrine warrants careful scrutiny against a backdrop of well over 200 years of unmitigated hostility to such power.

California's effort to justify its radical approach on the broad ground of deterrence and public safety likewise

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also commonly applied to a warrant lacking a complaint under oath or an adequate showing of cause." Davies, *supra* at 558.

represents a departure from the Framers' express intent to strictly limit "unreasonable search and seizures." While the Framers held a great distrust for the common officer, they were unconcerned with passing a congressional standard to regulate the warrantless officer as "they did not perceive ordinary officers as possessing any significant discretionary authority ... to initiate arrests or searches." Davies, *supra* at 578. Warrants, and not officers, were the main source of search and arrest authority. Framing-era common law gave no more arrest authority to common officers than it did to the general public, which mandated that a warrantless arrest could be justified only by "felony in fact," and nothing so loose as a general standard of "reasonableness." *Id.*

Given the limited power of the warrantless officer, the Framers intended to "control the officer by controlling the warrant," and had little reason to believe that the probable cause requirement would not effectuate such control. *Id.* at 552. California, however, not only hands back to the officer the very sort of general warrant the Framers despised, but also does so on a ground entirely foreign to them; namely, the notion that an officer's warrantless search or seizure can, without more, be construed as "reasonable" under the Fourth Amendment. Far from "controlling the warrant," California seeks to guarantee "reasonableness through reliance upon the good will of officers, a "deference" that is decidedly "at odds with the central purpose of the Fourth Amendment, which is distrust of discretionary police power." Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 248 (1993).

D. The Rights Of Others.

California's parole search doctrine contravenes not only the history of the Fourth Amendment and our nation's long-held hostility to the concept of general warrants, but also the privacy rights and liberty interests of others who may be impacted by the exercise of such broad authority. The breadth of authority that California confers upon its officers

to search the persons, homes and effects of state parolees necessarily threatens the interests of those who are not parolees and who are imbued by the Constitution with a full panoply of rights.

The search here is a case in point. Officer Rohleder stopped Petitioner on the street during an outing with his companion and her infant child, who was in a stroller at the time. While not technically a stop of these other two persons, it was a stop in effect. This Court has given careful consideration to the rights of others in such a context and certainly, where such a stop is predicated upon probable cause or reasonable suspicion, those rights must necessarily yield to public safety concerns. See *Maryland* v. *Wilson*, 519 U.S. 408, 413-15 (1997).

Here, however, California's rule makes manifest the inevitable phenomena of stops and searches that are not predicated on any specific justification. The co-residents of a parolee, for example, are subject to a search of their homes and effects at any time and for any reason short of harassment. To be sure, it may be said that such "third-parties" can avoid this vulnerability by avoiding a parolee altogether. But this is to impose upon those third-parties an "implied consent" theory that, as described above, is roundly and sensibly rejected by many courts, even California's, for parolees themselves. Further, it contradicts the rehabilitative purposes of parole to suggest that law-abiding citizens and family-members should avoid parolees. And, finally, it defies reality to suggest that the families and friends of parolees have a real choice in the matter when parolees, like Petitioner, attempt to resume their lives in the community and their role in the family unit. Neither the communities in which parolees live, nor their families should be put to such a Hobson's choice.

III. THE REASONABLE SUSPICION STANDARD IS THE LEAST RESTRICTIVE MEANS TO PROTECT THE FOURTH AMENDMENT INTERESTS AT ISSUE.

In allowing parole searches so long as they are not arbitrary, harassing, or capricious, the Supreme Court of California has become unmoored from the Fourth Amendment foundation of its parole system. Its approach is both unique and reactionary. It is unique because the overwhelming majority of States require, at a minimum, reasonable suspicion for parole searches. And it is reactionary because it is, in essence, an attempt to return to the general warrant days for which the Fourth Amendment was initially drafted.

Indeed, California's approach turns well-established Fourth Amendment law on its head. It makes no sense to allow suspicionless searches, on the one hand, and then to add a caveat that such searches may not be arbitrary or capricious. All of modern Fourth Amendment law is premised on the understanding that in the law enforcement context, the best and only way to ensure that a search *is not* arbitrary or capricious, or driven by some impermissible motive, is to insist that it *is* based on some articulable suspicion of wrongdoing. See *United States* v. *Knights*, 534 U.S. 112, 121 (2001) ("The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable."); *Whren* v. *United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Horton* v. *California*, 496 U.S. 128, 138 (1990) (explaining "evenhanded law enforcement is best achieved by the application of objective standards of conduct"); *Terry*, 392 U.S. at 15 ("[C]ourts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches

upon personal security without the objective evidentiary justification which the Constitution requires."). For all practical purposes, the "reasonable suspicion" requirement is the logical converse of arbitrary, capricious and harassing searches. To avoid the latter, we require the former.

For the reasons discussed above, California's novel experiment in Fourth Amendment law—cutting loose the prohibition on arbitrary, capricious and harassing law-enforcement searches from the reasonable suspicion requirement—has obvious flaws, and is bound to be entirely ineffective. That should come as no surprise. If there were a way to ensure that wholly unconstrained law-enforcement discretion would not be used in arbitrary or capricious ways, or to target racial or other minorities, then there would have been no need for the reasonable suspicion standard in the first place.

The reasonable suspicion standard therefore represents the least restrictive means to accomplish California's monitoring and public safety goals while adequately protecting acknowledged privacy interests. That standard affords officers tremendous flexibility—allowing them to act on mere suspicions that need only be articulable and not wholly irrational. Practically speaking, no standard is less restrictive and yet short of full officer discretion. California's proposed standard does not functionally limit officer discretion in any meaningful way and cannot, in any event, be applied in any sort of "bright-line" manner. Whether any particular action is "arbitrary, capricious or harassing" is patently subjective and difficult to assess fairly in any context, much less by officers who are executing their duties in the street. California's deviation from the reasonable suspicion standard must therefore be rejected in favor of the more prevalent and sound "reasonable suspicion" standard.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal of California should be reversed.

Respectfully submitted,

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November 28, 2005

APPENDIX

STATE OF CALIFORNIA — DEPARTMENT OF CORRECTIONS

NOTICE AND CONDITIONS OF PAROLE

CDC 1515 (REV 05/01)

You will be released on parole effective _____ for a period of **3 YEARS**. This parole is subject to the following notice and conditions. Should you violate conditions of this parole, you are subject to arrest, suspension, and/or revocation of your parole.

You waive extradition to the State of California from any state or territory of the United States or from the District of Columbia. You will not contest any effort to return you to the State of California.

When the Board of Prison Terms determines, based upon psychiatric reasons, that you pose a danger to yourself or others, the Board may, if necessary for psychiatric treatment, order your placement in a community treatment facility or state prison or may revoke your parole and order your return to prison. You and your residence and any property under your control may be searched without a warrant by an agent of the Department of Corrections or any law enforcement officer.

If another jurisdiction has lodged a detainer against you, you may be released to the custody of that jurisdiction. Should you be released from their custody prior to the expiration of your California parole, or should the detainer not be exercised, you are to immediately contact the nearest Department of Corrections' Parole and Community Services Division Office for instructions concerning reporting to a parole agent.

You have been informed and have received in writing the procedure for obtaining a Certificate of Rehabilitation (4852.21 PC).

CONDITIONS OF PAROLE

1. **SPECIAL CONDITIONS MUST:** a) Relate to the crime for which you were convicted, b) Relate to conduct which is itself criminal, c) Prohibit conduct which may be related to future criminality. You are subject to the following special conditions: _____

1. **You will participate in antinarcotic testing in accordance with instructions from a parole agent.**
2. **You will totally abstain from the use of any alcoholic beverages or liquor.**
3. **You will participate in the psychiatric treatment program approved for you by P&CSD.**
4. **You will not have contact with minors without prior approval of P&CSD.**
5. **You will not contact _____, in any manner without the approval of P&CSD.**
6. **You are prohibited from possessing, utilizing or having access to pagers, scanners, police radios or mobile phone equipment, unless you can demonstrate that they are related to legitimate employment needs.**
7. **You will not wear, possess, have access to or display gang attire, insignias or paraphernalia.**
8. **You will not associate with gang members without prior approval from P&CSD.**
9. **You are prohibited from residing within one-quarter mile of any school that contains grades Kindergarten through six.**
10. **You shall not engage in gang participation as defined in CA. Code of Regulation Title 15, Section 2513(e).**
11. **Not to enter the United States Illegally.**
12. **You will successfully complete a batterer's program as directed by P&CSD.**
13. **You will successfully complete a domestic violence/anger management program as directed by P&CSD.**
14. **You shall participate in a drug treatment program at the direction of your parole agent.**
15. **You are prohibited from residing in a "single family dwelling" with any person also required to register pursuant to PC Section 290, unless they are legally related to you by blood, marriage or adoption, "single family dwelling" shall not include a residential facility that serves six or fewer persons.**
16. **You are not to use any name other than _____.**
17. **You will successfully complete parenting counsels classes.**

Reasons for the imposition of special conditions of parole: _____

1) History of drug use/abuse 2) History of alcohol abuse 3) Related to commitment offense 4) History of psychiatric problems 5)Nature of commitment offense 6) Nature of criminal history 7) History of violence or threats of violence 8) Request of _____ 9) Due to nature of commitment offense 10) Due to gang membership or affiliation 11) BPT imposed due to validated gang member 12) Illegal alien status 13) PC 3053.2 14) History of anger management problems 15) Pursuant to PC 3053.2 16) Prop 36 Mandated.

_____ I acknowledge my special conditions of parole.

Parolee's Initials

_____ SIGNATURE OF UNIT SUPERVISOR

_____ DATE SIGNED

2. **RELEASE, REPORTING, RESIDENCE, AND TRAVEL:** Unless other arrangements are approved in writing, you will report to your parole agent on the first working day following your release. Any change of residence shall be reported to your parole agent in advance. You will inform your parole agent within 72 hours of any change of employment location, employer, or termination of employment.

3. **PAROLE AGENT INSTRUCTIONS:** You shall comply with all instructions of your parole agent and will not travel more than 50 miles from your residence without his/her prior approval. You will not be absent from your county of residence for a period of more than 48 hours and not leave the State of California without prior written approval of your parole agent.

4. **CRIMINAL CONDUCT:** You shall not engage in conduct prohibited by law (state, federal, county or municipal). You shall immediately inform your parole agent if you are arrested for a felony or misdemeanor crime. Conduct prohibited by law may result in parole revocation even though no criminal conviction occurs.

5. **WEAPONS:** You shall not own, use, have access to, or have under your control, (a) any type of firearm or instrument or device which a reasonable person would believe to be capable of being used as a firearm or any ammunition which could be used in a firearm, (b) any weapon defined in state or federal statutes

or listed in California Penal Code Section 12020 or any instrument or devicewhich a reasonable person would believe to be capable of being used as a weapon as defined in Penal Code Section 12020; (c) anyknife with a blade longer than two inches, except kitchen knives which must be kept in your residence and knives related to your employment which may be used and carried only in connection with your employment; or (d) a crossbow of any kind.

6. You shall sign the parole agreement containing the conditions of parole specified in the Board of Prison Terms (BPT) Rules Section 2512 and any special conditions imposed as specified in BPT Rules Section 2513. Penal Code Section 3060.5 provides that the BPT shall revoke any prisoner/parolee who refuses to sign the Notice and Conditions of Parole. You have the right to appeal the special conditions of parole. Special conditions imposed by the Parole and Community Services Division may be appealed pursuant to California Code of Regulations (CCR), Section 3084 and 3085. Special Conditions of parole imposed by the BPT may be appealed pursuant to CCR, Section 2050.

I have read or have had read to me and understand the conditions of parole as they apply to me.

CDC NUMBER	PAROLEE'S NAME (Print or Type)	PAROLEE'S SIGNATURE	DATE SIGNED

TO BE COMPLETED BY STAFF:

Does the inmate/parolee have a qualifying disability requiring effective communication? ☐YES ☐NO

If yes, cite the source document and/or observations: _____

What type of accommodation/assistance was provided to achieve effective communication to the best of the inmate's/parolee's ability? _____

STAFF NAME (Print or Type)	STAFF SIGNATURE	DATE SIGNED

State of Connecticut
Board of Pardons and Paroles

Statement of Understanding and Agreement

CONDITIONS OF PAROLE

NAME _____ CJIS NO. _____ RELEASE ON OR AFTER _____

1. **RELEASE DIRECTION.** UPON RELEASE, YOU WILL REPORT TO YOUR ASSIGNED PAROLE OFFICER AS DIRECTED AND FOLLOW THE PAROLE OFFICER'S INSTRUCTIONS. YOU WILL REPORT TO YOUR PAROLE OFFICER IN PERSON, BY TELEPHONE AND IN WRITING WHENEVER AND WHEREVER THE PAROLE OFFICER DIRECTS.

2. **LEVELS OF SUPERVISION.** YOUR PAROLE OFFICER WILL ASSIGN YOU TO ONE OF SEVERAL LEVELS OF COMMUNITY SUPERVISION, DEPENDING UPON YOUR CIRCUMSTANCE. THESE LEVELS OF COMMUNITY SUPERVISION MAY INCREASE DEPENDING UPON CHANGES IN CIRCUMSTANCES, AT THE DISCRETION OF THE PAROLE OFFICER, AND MAY INCLUDE RESIDENTIAL PLACEMENT, ELECTRONIC MONITORING, CURFEW, AVOIDANCE OF SPECIFIC GEOGRAPHICAL AREAS AND AVOIDANCE OF SPECIFIC SOCIAL CIRCUMSTANCES OR INDIVIDUALS.

3. **RESIDENCE.** YOU WILL LIVE IN A RESIDENCE APPROVED BY YOUR PAROLE OFFICER AND YOU WILL COORDINATE ANY CHANGES IN YOUR PLACE OF RESIDENCE THROUGH YOUR PAROLE OFFICER BEFORE MOVING. YOUR PAROLE OFFICER HAS THE RIGHT TO VISIT YOUR RESIDENCE AT ANY REASONABLE TIME.

4. **EMPLOYMENT.** YOU WILL SEEK, OBTAIN AND MAINTAIN EMPLOYMENT THROUGHOUT YOUR PAROLE TERM, OR PERFORM COMMUNITY SERVICE AS DIRECTED BY YOUR PAROLE OFFICER. YOUR PAROLE OFFICER HAS THE RIGHT TO VISIT YOUR PLACE OF EMPLOYMENT OR COMMUNITY SERVICE AT ANY REASONABLE TIME.

5. **MARITAL/DOMESTIC STATUS.** YOU WILL KEEP YOUR PAROLE OFFICER INFORMED OF ANY CHANGES IN YOUR MARITAL OR DOMESTIC STATUS.

6. **FIREARMS PROHIBITED.** YOU WILL NOT USE, OR HAVE IN YOUR POSSESSION OR CONTROL, FIREARMS, AMMUNITION, OR ANY OTHER WEAPON OR OBJECT THAT CAN BE USED AS A WEAPON.

7. **SUBSTANCE ABUSE TREATMENT.** YOU WILL PARTICIPATE IN AN ADDICTION SERVICES EVALUATION AND TREATMENT AS DEEMED APPROPRIATE. YOU WILL FOLLOW THE INSTRUCTIONS OF THE PROGRAM STAFF AND YOUR PAROLE OFFICER AND WILL NOT MAKE ANY CHANGES WITHOUT THE EXPRESS PERMISSION OF THE PROGRAM STAFF AND YOUR PAROLE OFFICER. YOU WILL ALSO SUBMIT TO RANDOM URINALYSIS FOR THE BALANCE OF YOUR PAROLE TERM.

8. **MENTAL HEALTH TREATMENT.** YOU MAY BE REQUIRED TO PARTICIPATE IN A MENTAL HEALTH SERVICES EVALUATION AND TREATMENT AS DEEMED APPROPRIATE. YOU WILL FOLLOW THE INSTRUCTIONS OF THE PROGRAM STAFF AND YOUR PAROLE OFFICER AND WILL NOT MAKE ANY CHANGES WITHOUT THE EXPRESS PERMISSION OF THE PROGRAM STAFF AND YOUR PAROLE OFFICER.

9. **DRUGS PROHIBITED.** YOU WILL NOT USE, OR HAVE IN YOUR POSSESSION OR CONTROL, ANY ILLEGAL DRUG, NARCOTIC OR DRUG PARAPHERNALIA.

10. **TRAVEL.** YOU WILL NOT LEAVE THE STATE OF CONNECTICUT WITHOUT PRIOR PERMISSION OF YOUR PAROLE OFFICER.

11. **OBEY ALL LAWS, REPORT ANY ARREST.** YOU WILL OBEY ALL LAWS, AND TO THE BEST OF YOUR ABILITY, FULFILL ALL YOUR LEGAL OBLIGATIONS, INCLUDING PAYMENT OF ALL APPLICABLE CHILD SUPPORT AND ALIMONY ORDERS. YOU WILL NOTIFY YOUR PAROLE OFFICER WITHIN 48 HOURS OF YOUR ARREST FOR ANY OFFENSE.

12. **GANG AFFILIATION.** YOU WILL NOT ASSOCIATE OR AFFILIATE WITH ANY STREET GANG, CRIMINAL ORGANIZATION OR WITH ANY INDIVIDUAL MEMBERS THEREOF.

13. **STATUTORY RELEASE CRITERIA.** YOUR RELEASE ON PAROLE IS BASED UPON THE PREMISE THAT THERE IS A REASONABLE PROBABILITY THAT YOU WILL LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW AND THAT YOUR RELEASE IS NOT INCOMPATIBLE WITH THE WELFARE OF SOCIETY. IN THE EVENT THAT YOU ENGAGE IN CONDUCT IN THE FUTURE WHICH RENDERS THIS PREMISE NO LONGER VALID, THEN YOUR PAROLE WILL BE REVOKED OR MODIFIED ACCORDINGLY.

14. **ADDITIONAL CONDITIONS.** YOU ALSO MUST ABIDE BY THE FOLLOWING INDIVIDUAL CONDITIONS.

FAILURE TO COMPLY WITH THESE CONDITIONS MAY RESULT IN THE REVOCATION OF PAROLE, AND, IF APPLICABLE, THE LOSS OF GOOD CONDUCT CREDITS EARNED WHILE IN PRISON.

I HAVE READ OR HAVE HAD READ TO ME, IN MY PRIMARY LANGUAGE, THE CONDITIONS OF PAROLE RELEASE. I FULLY UNDERSTAND MY OBLIGATIONS AND AGREE TO COMPLY WITH THESE CONDITIONS OF RELEASE ON PAROLE. IN ADDITION, I UNDERSTAND THAT THESE CONDITIONS SHALL APPLY TO ANY TERM OF SPECIAL PAROLE FOR WHICH I MAY HAVE BEEN SENTENCED TO SERVE.

_____	_____	_____	_____
Parolee	Date	Witness	Date
_____	_____	_____	_____
For the Board of Pardons and Paroles	Date	Hearing Location	Date

PAROLE CONDITIONS AND RESTRICTIONS

I agree to the following and understand that failure to comply with these conditions will subject me to arrest:

1. I will report to the parole officer at such times and places as directed. I will comply with the parole officer's instructions and respond truthfully to all inquiries from the parole officer.
2. I will comply with all lawful orders of the court and the parole board, and all instructions of the parole officer, including all court orders for the payment of fines, restitution, attorney fees, and child support, and the parole supervision fee mandated by RSA 504-A:13.
3. I will obtain the parole officer's permission before changing residence or employment or traveling out of state.
4. I will notify the parole officer immediately of any arrest, summons or questioning by a law enforcement officer.
5. I will diligently seek and maintain lawful employment, notify my employer of my parolee status, and support my dependents to the best of my ability.
6. I will not receive, possess, control or transport any real or simulated weapon, explosive, or firearm.
7. I will be of good conduct and obey all laws.
8. I will submit to breath, blood or urinalysis testing for the presence of any substance, or provide such other sample for testing, or submit to such other test or procedure, as may be directed by the parole board or my parole officer.
9. I will permit the parole officer to visit my residence at any time for the purpose of examination and inspection in the enforcement of the conditions of parole, and submit to searches of my person, property, and possessions as requested by the parole officer.
10. I will not associate with criminal companions or such other individuals as shall be ordered by the court or parole board. Prohibited contacts include victims, other parolees or probationers, and other persons known to the board or to the parole officer as having criminal records.
11. I will not illegally use, sell, possess, distribute, or be in the presence of controlled drugs, shall notify the parole officer of any prescribed medications, and shall not use alcoholic beverages to excess.
12. I waive extradition to the State of New Hampshire from any state in the United States or any other place, agree to return to New Hampshire if directed by the parole officer, and will be responsible for any and all costs, including all travel, in connection with any extradition request or proceeding.
13. The following specific conditions are imposed by the court or parole board:

A. ☐ I will participate regularly in Alcoholics Anonymous/Narcotics Anonymous to the satisfaction of the parole officer.

B. ☐ I will secure written permission from the parole officer prior to purchasing and/or operating a motor vehicle.

C. ☐ I will participate in and satisfactorily complete the following program:

_____

D. ☐ I will enroll and participate in mental health counseling on a regular basis to the satisfaction of the parole officer.

E. ☐ I will not be in the unsupervised company of (female/male) minors at any time.

F. ☐ I will not leave the county without permission of the parole officer.

G. ☐ I will refrain totally from the use of alcoholic beverages.

H. ☐ I will execute and deliver all necessary documents to release any and all otherwise privileged reports relating to medical or mental health care, counseling, employment, or income as may be requested by the parole officer.

I. ☐ Other:

If you violate any of the conditions of your parole, you are subject to arrest, revocation of your parole, and return to the NH State Prison. I hereby certify that I have this date received a copy of the rules and regulations of parole. I have read or had read to me the conditions, and I fully understand and agree to comply with them.

_____ Signature of Witness

_____ Signature of Parolee

_____ Title

_____ Dated

STATE OF OHIO
Department of Rehabilitation and Correction
Adult Parole Authority

CONDITIONS OF SUPERVISION

VIEWING SAMPLE ORDER FORMS FROM OPI

In consideration of having been granted supervision on ____/____/____, I agree to report to my supervising officer according to the instructions I have received and the following conditions:

1. I will obey federal, state and local laws and ordinances, including Chapter 2923. of the Revised Code relating to conduct involving firearms and other deadly weapons, and all orders, rules and regulations of _____ County Common Pleas Court or the Department of Rehabilitation and Correction. I agree to conduct myself as a responsible law abiding citizen. I understand that if I am convicted of a new felony offense while under Post Release Control, the Court may impose an additional prison term consecutive to any prison sentence imposed for the new felony offense.

2. I will always keep my supervising officer informed of my residence and place of employment. I will obtain permission from my supervising officer before changing my residence or my employment. I understand that if I am a releasee and abscond supervision, I may be prosecuted for the crime of escape, under section 2921.34 of the Revised Code.

3. I will not leave the State of Ohio without written permission of the Adult Parole Authority.

4. I will not enter the grounds of any correctional facility nor attempt to visit any prisoner without the written permission of my supervising officer. I will not communicate with any prisoner in any manner without obtaining permission from my supervising officer.

5. I will follow all orders verbal or written given to me by my supervising officer or other authorized representatives of the Court or the Department of Rehabilitation and Correction.

6. I will not purchase, possess, own, use or have under my control, any firearms, ammunition, dangerous ordinance or weapons, including chemical agents, electronic devices used to immobilize, pyrotechnics and/or explosive devices.

7. I will not purchase, possess, use or have under my control any narcotic drug or other controlled substance or illegal drugs, including any instrument, device or other object used to administer drugs or to prepare them for administration, unless it is lawfully prescribed for me by a licensed physician. I agree to inform my supervising officer promptly of any such prescription and I agree to submit to drug testing if required by the Adult Parole Authority.

8. I will report any arrest, citation of a violation of the law, conviction or any other contact with a law enforcement officer to my supervising officer no later than the next business day. I will not enter into any agreement or other arrangement with any law enforcement agency which might place me in the position of violating any law or condition of my supervision, unless I have obtained permission in writing from the Adult Parole Authority, or from the Court.

9. I agree to a search, without warrant, of my person, my motor vehicle, or my place of residence by a supervising officer or other authorized representative of the Department of Rehabilitation and Correction at any time. *Notice: Pursuant to section 2967.131 of the Revised Code, Officers of the Adult Parole Authority may conduct warrantless searches of your person, your place of residence, your personal property, or any property which you have been given permission to use if they have reasonable grounds to believe that you are not abiding by the law or terms and conditions of your supervision.*

10. I agree to sign a release of confidential information from any public or private agency if requested to do so by a supervising officer.

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(614) 877-2312
PCI OPI Print Shop

11. I agree not to associate with persons having a criminal background and/or persons who may have gang affiliation, or who could influence me to engage in criminal activity, without the prior permission of my supervising officer.

12. I agree to comply with all financial obligations, including child support and/or supervision fees as ordered by any court and/or the Department of Rehabilitation and Correction.

13. I agree to give all information regarding my financial status to assist in determining my ability to pay specific financial obligations, to my supervising officer.

14. I agree to follow all rules and regulations of treatment facilities or programs of any type in which I am placed or ordered to attend while under the jurisdiction of the Court, and/or Department of Rehabilitation and Correction.

15. I agree to fully participate in, and successfully complete, the following indicated Sanctions/Special conditions:

16. I agree and understand that if I am arrested in any other state or territory of the United States or in any foreign country, my signature as witnessed at the bottom of this page will be deemed to be a waiver of extradition and that no other formalities will be required for an authorized agent of the State of Ohio to bring about my return to this state.

I understand that I am required to pay the Financial Obligations listed. Failure to do so will negate any eligibility for an early termination of supervision and result in civil suit by the Attorney General's Office.

Financial Obligations

Type	Supervision Fees	Fines	Restitution	Court Costs	Child Support	Other
Amount						
Payment Frequency						
Completion Date						

I understand that I have a grievance process available to me and may request a grievance form from my supervising officer at any time. *However*, I also understand that I may not grieve Parole Board or Court Ordered Special Conditions and/or Sanctions, being arrested for supervision violations, failure to follow directions/instructions of my supervising officer, the final decision of previous grievances, complaints unrelated to supervision, e.g. legislative action, judicial proceedings and sentencing, or any matter exclusively within the jurisdiction of the courts or other agencies, e.g. Human Services. The grievance procedure has been read and/or explained to me and I am indicating by my signature that I understand this process.

I have read or had read to me the conditions of my _____. I fully understand these conditions and I agree to follow them. I understand that a violation of any of these conditions may result in the revocation of my _____ which may result in additional imposed sanctions, including imprisonment.

In addition, I understand that I must follow these conditions until notified by my supervising officer. By my signature I acknowledge that I have received a copy of these conditions of supervision. I further understand that I may request a meeting with my supervising officer or his/her supervisor if I feel any of the conditions or instructions are causing problems. I shall make this request in writing if at all possible.

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I further acknowledge I understand that I am under the supervision of the Adult Parole Authority until I receive a certificate or journal entry terminating my period of supervision. Be advised, ORC 2967.16 (B) establishes the categories for final release from post release control as "favorable" or "unfavorable." If you receive an unfavorable final release from your post release control, this could result in an enhancement of any future felony sentence.

Witness:	Date:	Offender Signature:	Date:

VIEWING SAMPLE ORDER FORMS FROM ORI

RULES AND CONDITIONS OF PAROLE

1. I will report to my parole officer and my employer immediately upon arrival at my destination.
2. I will obey all city, state and federal laws. I agree to immediately report any new arrests to my parole officer.
3. I agree not to leave the State of Oklahoma without prior written permission by my officer and not leave the county without permission of my officer or his/her district office.
4. I agree to report as directed by my officer in person and in writing on the forms provided by my officer. I agree to allow the officer to visit at home, work or other convenient places.
5. I agree to immediately report in person, in writing or by telephone any changes in residence, employment or marital status.
6. I agree not to use or possess drugs other than those legally prescribed by a physician. I agree not to use alcohol nor go onto the premises where alcoholic beverages are served,.
7. I agree not to lie or misrepresent the truth to any member of the Pardon and Parole Board, any employee of the Department of Corrections or any official of the government.
8. I agree not to associate with persons on parole or probation or persons with criminal records, communicate with inmates of any penal institution, except members of the immediate family, unless my parole officer gives permission because of work or other good reason.
9. I agree to pay parole fees of $40 per month, payable in cashier's check or money order to the Department of Corrections Restitution and Accounting.
10. I will comply with all lawful directives issued by my supervising officer or any member of the Department of Corrections.
11. I understand that at any time or place, I am subject to search. In addition, my vehicle and any property under my control are subject to search.
12. I agree to submit to urinalysis or any other substance abuse testing procedures as required by my parole officer.
13. I agree to pay, during the term of my parole, all fines and court costs imposed by the court at the time of my conviction.
14. I understand that Oklahoma State Statute 21 § 1283(d) prohibits anyone under the supervision of the Oklahoma Department of Corrections to own or possess a firearm. I agree not to own, possess or travel in a vehicle with a firearm or explosives.
15. Sex offenders will abide by special sex offender rules.
16. I understand that violations may result in the imposition of sanctions including but not limited to:

Financial Planning	Reintegration Training	Electronic Monitoring	Day Reporting
Mental Health Counseling		Intensive Supervision	Community Service
Temporary Placement in			
Attend AA	Attend M/A	Victim Impact Panel	a community correctional
Attend MRT	Curfew	Weekend Incarceration	facility or jail for up
GED Courses	Intensive Parole	Nighttime Incarceration	to 30 days Supervision

17. I agree to follow the special condition(s) listed below:

I have read these conditions and understand that I must obey them until the term of my parole expires. I understand that failure to comply with these rules and conditions may result in the imposition of intermediate sanctions or revocation of my parole. I also understand that a finding of guilt, or plea of guilty or nolo contendere will be evidence that I failed to obey the law. I will be arrested and sent back to prison to serve the remainder of my sentence plus any new sentences.

_____

WITNESS AND DATE SIGNATURE

_____

WITNESS AND DATE NUMBER

STATE OF TENNESSEE
BOARD OF PROBATION AND PAROLE
Division of Board Operations
Parole Certificate

Parole Type
«ParoleType»

«CertNo»

Certificate Type
«CertType»

«ParoleeName» – PRISON NUMBER «TomisID»,

is eligible to be paroled from the «InstLine»

and there is reasonable probability that said prisoner will remain at liberty without violating the law. It further being the opinion of the Tennessee Board of Probation and Parole that the parole of this prisoner is not incompatible with the welfare of society.

It is hereby ordered that said prisoner be, and hereby is paroled, subjective to the following conditions, effective: **«EffectiveDate»**

1. I will proceed directly to my destination and upon arrival report immediately to my Probation/Parole Officer or in any event no later than 72 hours after release.
2. I will obey the laws of the United States or any state, in which I may be, as well as any municipal ordinances.
3. I will report all arrests, including traffic violations, immediately, regardless of the outcome, to my Probation/Parole Officer. I will, when away from my residence, have on my person my parole identification card and present it to the proper authority.
4. I will not own, possess, or carry any type of deadly weapon (guns, rifles, knives) or any illegal weapons.
5. I will work steadily at a lawful occupation. If I become unemployed, I will immediately report this to my Probation/Parole Officer and then begin to look for another job.
6. I will get the permission of my Probation/Parole Officer before changing my residence or employment, or before leaving the county of my residence or the state.
7. I will allow my Probation/Parole Officer to visit my home, employment site, or elsewhere, and will carry out all lawful instructions he/she gives and report to my Probation/Parole Officer as instructed, and will carry out all lawful instructions of the Administrative Case Review Committee, and will comply with a referral to Resource Center programs, if available, by attending, and will submit to electronic monitoring or community service if required.
8. I agree to a search, without a warrant, of my person, vehicle, property, or place of residence by any Probation/Parole officer or law enforcement officer, at any time.
9. I will not use intoxicants (beer, whiskey, wines, etc) of any kind to excess. I will not use or have in my possession marijuana or other illegal drugs. I will submit to drug screens or drug tests as directed by my Probation/Parole Officer.
10. I will waive all extradition rights and processes and agree to return to Tennessee if at any time prior to my release from parole, the Board of Probation and Parole directs that I do so.
11. I agree to pay all required fees to the Supervision and Criminal Injuries fund.
12. I will not engage in any assaultive, abusive, threatening or intimidating behavior. Nor will I participate in any criminal street gang related activities as defined by TCA 40-35-121. I will not behave in a manner that poses a threat to others or myself.
13. If paroled to a detainer(s), I will report to the office designated if released from that detainer before my Tennessee parole expiration date.

SPECIAL CONDITIONS:

1. «Spec1»
2. «Spec2»
3. «Spec3»
4. «Spec4»
5. «Spec5»

Parole Officer: «ParoleOfficerLine»
Location: «LocationLine»

I fully understand this order of parole, and I agree to comply with such conditions during the period of my parole, this the _____day of _____, 20_____. Further I hereby waive all extradition rights and process and agree to return to Tennessee voluntarily if at any time prior to my release the Tennessee Board of Probation and Paroles directs me to do so. Said parole shall expire upon the sentence expiration date.

_____ WITNESS SIGNATURE

_____ PAROLEE SIGNATURE

Distribution: Central Office, Parole Officer, Parolee, Institution

BP-0815 (Revised 2-97)

RDA N/A

Utah Parole Agreement

I agree to be directed and supervised by agents of the Utah State Department of Corrections and will abide by the following conditions of my parole:

1. Release: On the day of my release from the institution or confinement, I will report to my assigned Parole Agent, unless otherwise approved in writing from the parole office.

2. Absconding: I will not abscond from parole supervision:

a. Reporting: I will report as directed by the Department of Corrections.
b. Residence: I will establish and reside at a residence of record and will not change my residence without first obtaining permission from my parole agent.
c. Leaving the State: I will not leave my state of residence, even briefly, or any other state to which I am released or transferred without prior written permission from my parole agent.

3. Conduct: I will obey all State, Federal and municipal laws. If arrested, cited or questioned by a peace officer, I will notify my parole agent within 48 hours of the incident.

4. Home Visits: I will permit visits to my place of residence by agents of Adult Probation and Parole for the purpose of ensuring compliance with the conditions of my parole. I will not interfere with requirement; I.e. Having vicious dogs, perimeter security doors, refusing to open the door, etc.

5. Searches: I will permit agents of Adult Probation and Parole to search my person, residence, vehicle or any other property under my control, without a warrant, at any time, day or night, upon reasonable suspicion to ensure compliance with the conditions of my parole.

6. Weapons: I will not own, possess, have under my control or in my custody any explosive, firearms, or dangerous weapons as defined in Utah Code Annotated, Section 76-10-501, as amended.

7. Employment: Unless otherwise authorized by my parole agent, I will seek, obtain, and maintain verifiable, lawful full-time employment (32 hours per week minimum) as approved by my parole agent. I will notify my parole agent of any change in employment within 48 hours.

8. Association: I will not knowingly associate with any person who is involved in criminal activity or who has been convicted of a felony, without approval from my parole agent.

9. Chemical Analysis: I will submit to testing of my breath, body fluids or hair to ensure compliance with my parole agreement.

10. Truthfulness: I will be cooperative, compliant and truthful in all my dealings with Adult Probation and Parole.

11. Fees: I will pay supervision fees as determined by the Department of Corrections.

12. Special Conditions: I will 1.____ 2. ____ 3. ____

I have read, understand, and agree to be bound by this agreement. If I violate any of these conditions of this agreement, the Board of pardons and Parole may revoke my parole or the Department of Corrections may take other appropriate action against me.

Date _____ Signed _____ USP NO. _____ Date _____

Witnessed by _____ Authorized By _____
Board of Pardons

(COPIED AND PASTED FROM UTAH'S WEBSITE)

TO: _____ **No.** _____

In accordance with law (Title 53,1-136, Chapter IV, Code of Virginia) you have been granted parole, and if accepted by you, your release from the Department of Corrections is directed on _____.
You are placed under the custody and control of the Virginia Parole Board subject to the parole conditions listed below. While you are on parole the Board may revoke your parole, based on a violation of one or more of the conditions of parole, based on a finding by the Board that you are otherwise unfit or unsuitable to remain on parole supervision. Your parole may be extended beyond the established parole period for good cause shown. You are subject to arrest upon cause shown by the Parole Board or the Parole Officer. Your minimum date of release from supervision is _____, but you will remain under supervision until you receive the final order of discharge from the Parole Board.
Your general parole conditions are:

1. I will obey all Federal, State and local laws and ordinances.
2. I will report any arrest, including traffic tickets, within 3 days to the Parole Officer.
3. I will maintain regular employment and I will notify the Parole Officer promptly of any changes in my employment.
4. I will report in person or by telephone to the Probation and Parole office listed below within three working days of my release from incarceration, and as otherwise instructed thereafter.
5. I will permit the Parole Officer to visit my home and place of employment.
6. I will follow the Parole Officer's instructions and will be truthful, cooperative, and report as instructed.
7. I will not use alcoholic beverages to the extent that it disrupts or interferes with my employment or orderly conduct.
8. I will not unlawfully use, possess or distribute controlled substances or related paraphernalia.
9. I will not use, own, possess, transport or carry a firearm.
10. I will not change my residence without the permission of the Parole Officer. I will not leave the State of Virginia or travel outside of a designated area without permission of the Parole Officer.
11. I will not abscond from supervision. I understand I will be considered an absconder when my whereabouts are no longer known to my supervising officer.

The special conditions ordered by the Parole Board are:

Your release plan is:
By direction of the
Virginia Parole Board

_____
COMMUNITY RELEASE MANAGER, DIVISION OF OPERATIONS

I have read (had read and explained to me) the above and by my signature or mark below acknowledge receipt of this and understanding of the requirements upon me.
Any person sentenced to a term of incarceration for a felony offense committed on/or after January 1, 1995, shall not be eligible for parole for that offense. A maximum of four and one-half days sentence credit may be earned for each thirty days served for that offense. Pursuant to Virginia Code section 2.1-382, you are hereby notified that the following parolee status information will be released upon request on/after July 8, 1996: your name, current address, offense, age, gender, race and the starting and minimum expiration date of your parole. If you have any questions, please contact your Probation and Parole Officer.____[INITIAL]

Parolee: _____ Date _____
Witness: _____ Date _____

(5)

Supreme Court, U.S.
FILED
JAN 11 2006
OFFICE OF THE CLERK

No. 04-9728

IN THE
Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner

v.

STATE OF CALIFORNIA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF OF THE STATES OF PENNSYLVANIA, ARKANSAS, COLORADO, HAWAII, IDAHO, ILLINOIS, KENTUCKY, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, NEVADA, NORTH DAKOTA, OREGON, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Commonwealth of Pennsylvania

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

ABSENT EVIDENCE THAT THE SEARCH OF SAMSON WAS FOR AN ILLEGITIMATE PURPOSE, THE SEARCH WAS REASONABLE SINCE IT WAS PERFORMED AS A CONDITION OF HIS PAROLE 6

A. Suspicionless Searches Are Permissible Under the Fourth Amendment Where the Government Has Special Needs Beyond the Normal Requirements of Law Enforcement 8

B. The States Have a Substantial Need to Conduct Searches of Parolees Absent Any Reasonable Suspicion of Wrongdoing As a Condition of Their Parole 10

CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Page**

Chandler v. Miller,
520 U.S. 305 (1997) 8

Colonnade Catering Corp. v. United States,
397 U.S. 72 (1970) 9

Donovan v. Dewey,
452 U.S. 594 (1981) 9

Elkins v. United States,
364 U.S. 206 (1960) 6

Griffin v. Wisconsin,
483 U.S. 868 (1987) 9, 10, 14, 17

Hudson v. Palmer,
468 U.S. 517 (1984) 9

Michigan Dept. of State Police v. Sitz,
496 U.S. 444 (1990) 8

Morrissey v. Brewer,
408 U.S. 471 (1972) 10, 11, 14

National Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989) 8, 9

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 9

New York v. Burger,
482 U.S. 691 (1987) 8, 15, 16

O'Connor v. Ortega,
480 U.S. 709 (1987) 8

TABLE OF AUTHORITIES – CONT'D.

Cases: **Page:**

People v. Reyes,
19 Cal.4th 743 (1998) 7

Skinner v. Railway Labor Executives Association,
489 U.S. 609 (1989) 8, 9, 16

United States v. Biswell,
406 U.S. 311 (1972) 9, 16

United States v. Knights,
534 U.S. 112 (2001) 6, 9, 14

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 9

Veronia School District v. Acton,
515 U.S. 646 (1995) 8, 16

Wyoming v. Houghton,
526 U.S. 295 (1999) 6

Constitutional Provisions:

U.S. Const. Amend. IV 6

Other Authorities:

Criminal Justice Statistics (2003), U.S. Dep't of Justice, Bureau of Justice Statistics 1, 12

Probation and Parole in the United States, 2004 U.S. Dep't of Justice, Bureau of Justice Statistics 11

TABLE OF AUTHORITIES – CONT'D.

Other Authorities: **Page:**

2003 State Expenditure Report, National Association of State Budget Officers 12

Does Parole Work, Urban Institute (March 2005)... 13

J. Gobert & N. Cohen, *The Law of Probation and Parole* (1983)..... 15

INTEREST OF THE AMICI

The States, along with the Federal government, share the important responsibility of administering the nation's criminal justice system. Although the prevention, detection, investigation and prosecution of crime are a critical part of that system, society's ability to reduce and eliminate crime is ultimately dependent on the effectiveness of its efforts to punish and rehabilitate those who have already been convicted in the nation's courts.

There are almost 7 million people who are in prison or under some other type of correctional supervision in the United States.[1] Of these, approximately 96 percent are in the custody or under the supervision of state authorities.[2] While the threat of incarceration is the most important deterrent to crime, 71 percent of those under the correctional supervision of the states (over 4.5 million people) are not in prison, but are on probation or parole.[3] Furthermore, of those who are in prison, a vast majority will not complete their sentence in prison, but will be placed under some type of supervised release as the last step in their rehabilitation. Although the administration of such programs typically receive less attention in terms of both resources and public scrutiny than the operation of our nation's prisons, they are no less important in furthering the goals of rehabilitation and the deterrence of crime.

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[1] Sourcebook of Criminal Justice Statistics (2003), U.S. Dep't of Justice, Bureau of Justice Statistics, at p. 479.

[2] *Id.*

[3] *Id.*

The supervision of former prisoners while on parole is a vital and necessary step in the rehabilitation process. It is completely unrealistic to believe that most prisoners can successfully transition themselves back into society without the assistance and support which parole offers. No matter what rehabilitative services the states can provide prisoners while in prison, it remains a highly controlled environment with little or no personal freedom. Prisoners are simply ill-equipped to handle the responsibilities which accompany the liberty offered to them upon their release on their own. Parole offers individuals not only support in terms of such things as counseling, job placement, and housing, but also provides supervision aimed at preventing recidivism and insuring public safety.

The *amici* States, like respondent California, will be unduly hampered in their ability to enforce the conditions of parole and insure that parolees obey the law if the same or similar standards apply to parole searches as apply to searches of members of the general population. If parole officers or the police must have probable cause or reasonable suspicion before they may conduct a search, such conditions become ineffective and largely meaningless. The deterrent effect is increased where parolees know that they can be searched at any time in accordance with the conditions of their parole. Conversely, where the States are required to provide an independent justification for a search beyond the fact that an individual is on parole, the average parolee is more inclined to believe that he or she can disregard the terms of his parole or engage in criminal activity without being caught and returned to prison. Parolees are more likely to comply with the conditions of their parole when they believe that there is a significant likelihood that they will in fact be searched as opposed to merely a theoretical possibility.

If the States are unable to conduct searches until there are already outward signs that the conditions of

parole have been broken, it is extremely difficult to intervene and take corrective measures short of rescinding parole or prosecuting the parolee for new criminal offenses. Ideally, searches of parolees should be viewed not as an attempt by the government to "catch" parolees engaged in criminal activity but instead as part of the process of rehabilitation. A system predicated on such searches is not arbitrary or capricious, but is grounded on sound penological principles. It allows parole officers to stop undesirable behavior before it is too late and while remedial measures short of returning parolees to prison can still be effective. While parole searches undoubtedly benefit society as a whole by preventing crime and increasing public safety, they directly benefit parolees by providing them with a true incentive to comply with the conditions of their parole. This is particularly important considering that most parolees lack the necessary skills and intrinsic motivation to comply with the conditions of parole on their own.

SUMMARY OF ARGUMENT

The supervision of parolees by parole authorities falls into that small class of cases, recognized by the Court, in which searches without any individualized suspicion of wrongdoing are nevertheless "reasonable" within the meaning of the Fourth Amendment. The Court has upheld such searches – of closely regulated businesses, for example – where a diminished expectation of privacy, plus an important governmental need met by the search, combine to justify them.

Certainly, parolees have a diminished expectation of privacy. The government routinely subjects convicted criminals, conditionally released on parole, to a variety of restrictions, some of which would not be constitutional if applied to the general public, and violation of which is grounds for immediate recommitment. Parolees may, for example, be forbidden to change their residence without permission, to consume alcoholic beverages or illegal drugs, to possess weapons, or to commit further crimes; they may be required to undergo treatment for drug or alcohol dependence, or to avoid certain persons or locations. Parolees are thus, like probationers, in a supervisory relationship with the government quite unlike that of free citizens.

Nor can the importance of the governmental interest be overstated. As the Court has recognized, such restrictions on parolees serve the dual purpose of protecting the public from further harmful behavior, and of furthering the rehabilitation and reintegration of the offender into society. The Court has likewise recognized the overwhelming interest of the government in promptly recommitting parolees who do not comply with the conditions of their parole.

To ensure compliance with these restrictions, government requires broad discretion to define the conditions under which the persons and property of parolees may be searched. The government may therefore require that convicted criminals, as a condition of parole, submit to searches without any need for an individualized suspicion of wrongdoing, as long as those searches are related to some legitimate penological objective such as ensuring that parolees are complying with the conditions of their release.

ARGUMENT

ABSENT EVIDENCE THAT THE SEARCH OF SAMSON WAS FOR AN ILLEGITIMATE PURPOSE, THE SEARCH WAS REASONABLE SINCE IT WAS PERFORMED AS A CONDITION OF HIS PAROLE.

The Fourth Amendment to the Constitution provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. Amend. IV. The prohibition against unreasonable searches and seizures is applicable to state officers. *Elkins v. United States*, 364 U.S. 206, 213 (1960). The "touchstone" of the Fourth Amendment is reasonableness, and reasonableness in turn is "determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

In *United States v. Knights*, 534 U.S. 112, 120-21 (2001), the Court recognized that there are special circumstances associated with probation which give the government a heightened interest in conducting searches while at the same time diminishing an individual's expectation of privacy. Although the Court in *Knights* did not need to reach the question of whether suspicionless searches of probationers was permitted under the Fourth Amendment, *see id.* at 120 n.6., the Court's analysis in that case supports such a conclusion. Furthermore, the States' interest in conducting suspicionless searches of parolees is no less substantial than its interest in conducting searches of probationers. Therefore, the Court should rule that suspicionless searches of both parolees and

probationers are permissible under the Fourth Amendment.

In the present case, the petitioner was searched by a police officer pursuant to a condition of his parole. The California Court of Appeal, following the California Supreme Court's decision in *People v. Reyes*, 19 Cal.4th 743, 752 (1998), held that a parole search does not violate the Fourth Amendment "'so long as it is not arbitrary, capricious or harassing,' and does not exceed the scope of the consent." J.A. at 12. The California Court of Appeal determined that a parolee who is released pursuant to a parole condition which permits that he be searched by law enforcement officials does not have an expectation of privacy which is violated by being searched unless the motivation for the search is unrelated to any "'rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee.'" J.A. 13.

The rule established by the California Courts should be upheld because it is supported by the plain text of the Fourth Amendment and by prior decisions of this Court which have held that suspicionless searches are permissible where the government has "special needs" which go beyond the normal needs of law enforcement. The government has a substantial interest in being able to conduct parole searches as part of the process of reintegrating those convicted of crimes back into society. Furthermore, this interest cannot be as effectively carried out through other means. The States need the flexibility to operate their parole systems in a manner which will increase their ability to successfully rehabilitate parolees, create a greater incentive for parolees to comply with the conditions of their parole, and better protect the public by preventing parolees from committing new crimes while they complete the rehabilitation process. The Court should give the States the ability to administer parole more effectively

by establishing a bright line rule which permits States to conduct suspicionless searches as a condition of parole so long as they are done for a legitimate purpose such as rehabilitation or law enforcement.

A. Suspicionless Searches Are Permissible Under The Fourth Amendment Where The Government Has Special Needs Beyond The Normal Requirements Of Law Enforcement.

To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. *Chandler v. Miller,* 520 U.S. 305, 313 (1997). The Court has recognized, however, that in some cases suspicionless searches are permissible. *Id.* (*citing Vernonia School District v. Acton,* 515 U.S. 646, 652-53 (1995) (random drug tests of student-athletes)); *Skinner v. Railway Labor Executives Association,* 489 U.S. 609, 619 (1989) (drug and alcohol tests for railway employees involved in train accidents); *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 665-66 (1989) (drug tests as condition of promotion in Customs Service); *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 447 (1990) (sobriety checkpoints along highways). The exceptions are based on "special needs, beyond the normal need for law enforcement." *Skinner,* 489 U.S. at 619.

In addition, the Court has held that in certain situations probable cause is not necessary to effect a search. The Court has held, for example, that government employers and supervisors may conduct warrantless searches of employees' desks and offices without probable cause. *O'Connor v. Ortega,* 480 U.S. 709, 721-25 (1987). Similarly, the Court has held that government investigators conducting searches of closely-regulated businesses need not adhere to the warrant or probable cause requirements as long as the searches meet reasonable legislative or administrative

standards. *New York v. Burger*, 482 U.S. 691, 702 (1987) (automobile dismantling business). *Accord Donovan v. Dewey*, 452 U.S. 594, 600 (1981) (coal mining); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (firearms sales); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (catering business engaged in liquor sales). The Court also has held that the search of a high school student's purse by school officials does not require a warrant or probable cause, *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985), as well as that, because of the extraordinary needs of those charged with administering prisons, the Fourth Amendment is inapplicable to the search of a prison inmate's cell. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). Likewise, the Court has held that law enforcement officials may stop individuals for questioning or observation at fixed border checkpoints without a particular level of suspicion. *United States v. Martinez-Fuerte*, 428 U.S. 543, 545-50 (1976). Finally, and closely analogous to this case, the Court has held that the search of a probationer's home by state probation officers, pursuant to a regulation requiring "reasonable grounds," does not require a warrant supported by probable cause. *Griffin v. Wisconsin*, 483 U.S. 868, 876-77 (1987). *See also Knights*, 534 U.S. at 121 (requiring "no more than reasonable suspicion to conduct a search of [a] probationer's house").

Thus, the Court clearly has recognized situations where the usual requirements of the Fourth Amendment simply do not apply or the particular circumstances and needs permit "exceptions" to the general rule. *Griffin*, 483 U.S. at 873; *Knights*. When such special needs exist, the Court has undertaken a "context-specific" inquiry, examining the competing interests at stake. *National Treasury Employees Union v. Van Raab*, 489 U.S. at 665-66; *Skinner*, 489 U.S. at 624. In the context of parole, the government has a substantial need to conduct suspicionless searches while at the same time the parolee has a diminished

expectation of privacy. *See Knights*, 534 U.S. at 119-21. Under these circumstances, suspicionless searches of parolees are reasonable and should be permitted by the Court.

B. The States Have A Substantial Need To Conduct Searches Of Parolees Absent Any Reasonable Suspicion Of Wrongdoing As A Condition Of Their Parole.

In *Griffin v. Wisconsin*, the court premised its conclusion that a state's operation of a probation system presents special needs, justifying departures from the usual requirements, on the fact that probation –like incarceration- is a "'form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty;" it represents one of several options on a "continuum of possible punishments ranging from solitary confinement in a maximum security facility to a dew hours of mandatory community service." 483 U.S. at 874 (citations omitted).

The operation of a system of supervised release on parole - just as a probation system - presents special needs justifying departure from the usual Fourth Amendment requirements. As the Court has recognized, the "essence" of parole is release from prison, before completion of the sentence, on the condition that the prisoner abide by certain rules during the balance of he sentence. *Morrissey v. Brewer*, 408 U.S 471, 477 (1972). Parole has become an "integral part" of the nation's overall system of managing offenders. *Id.* The Court has described parole as follows:

> Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted

> criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.

Id. In recognition of the conditional liberty restored to an offender by parole, the Court has held that revocation of parole deprives him not of an "absolute" interest but of an interest "properly dependent on observance of special parole restrictions," *id.* at 480, and the revocation needs to be accompanied by only informal procedural protections. *Id. at* 487-88.

Furthermore, as the Court recognized in *Morrissey,* to accomplish the purpose of parole, those who are granted permission to leave prison early properly may be subjected to very specific conditions. These conditions "restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen," *id.* at 478, and can include such restrictions as the need to seek permission to change residences, a prohibition against consumption of alcohol, and the direction to refrain from association with certain individuals or engaging in certain activities. *Id.*

The States have a significant interest in monitoring those individuals who are on parole to insure that they comply with the conditions of parole and do not engage in criminal activity. Unfortunately, the rate of recidivism among those on parole is relatively high. In 2004, only 46 percent of parolees successfully completed their period of supervision.[4] This raises

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[4] Probation and Parole in the United States, 2004, U.S. Dep't of Justice, Bureau of Justice Statistics, at p. 9.

concerns regarding not only the effectiveness of parole for purposes of rehabilitation, but also the effectiveness of parole in deterring crime and insuring public safety. However, limiting parole and keeping people in prison longer is not a viable solution to this problem.

The cost of building and operating prisons is already a significant constraint on the budgets of state governments. In 2003, the states spent $39.4 billion for items related to corrections.[5] This represents 3.5 percent of all expenditures in state budgets nationwide.[6] The cost to the states of corrections has been growing by 7.1 percent per year since 1990.[7] The cost of building additional prisons and paying to operate them would place an even greater strain on state budgets at a time when funding for other programs is already being cut.

Housing individuals in prison is significantly more expensive than supervising them while they live in the community. Although less than 30 percent of those under correctional supervision are in prison,[8] 81.5 percent of all expenditures go towards prison construction and operating costs.[9] In 2003, it cost the states approximately $15,200 for each inmate kept in prison. Conversely, the cost of keeping someone on probation or parole was only $1,400.[10] Even if eliminating or greatly reducing the use of probation and

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[5] 2003 State Expenditure Report, National Association of State Budget Officers, at p. 56.

[6] *Id.* at p. 4.

[7] *Id.* at p. 56.

[8] Sourcebook of Criminal Justice Statistics (2003), U.S. Dep't of Justice, Bureau of Justice Statistics, at p. 479.

[9] *Id.* at p. 14.

[10] *Id.* at pp. 14 & 479.

parole would further the goals of rehabilitation, it is not fiscally possible.

Although correctional supervision differs in significant respects among the states, all probationers and parolees are subject to terms and conditions which both facilitate the rehabilitative process and help deter the commission of new crimes. Typically, these conditions include the right of parole officers and other law enforcement officials to search individuals, their property, and their residences to determine whether they are complying with the conditions of their release. Although the scope and frequency of such searches differ, they allow state officials to monitor the activities of probationers and parolees without the types of restrictions which apply to searches of members of the general population.

As a matter of public policy, eliminating the supervision of former prisoners as they adjust to life in the community ultimately would undermine the goals of the criminal justice system. The recidivism rate of those on parole is highest during the time immediately after their release from prison and the chances of successfully meeting the conditions of parole steadily increase over time.[11] Individuals who have been recently released on parole are at a greater risk of violating the conditions of their parole or committing new crimes than any other group in the population with the possible exception of those who are simply unconditionally released from prison. Therefore, there is a definite need for the states to be able to more closely monitor the activities of those released from prison while on parole.

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[11] Does Parole Work, Urban Institute (March 2005), at p. 13, Fig. 4.

Supervision of parolees, therefore, plainly is a "special need" of the States "permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Griffin v. Wisconsin*, 483 U.S. at 875. While restrictions upon a free citizen's right to travel or to associate with others of his choosing certainly could present significant constitutional concerns, the Court has recognized that the diminished expectation of privacy of probationers and parolees, together with society's need to supervise them closely, permits these restrictions. The Court has stated:

> To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy "the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special . . . restrictions."

Griffin, 483 U.S at 874 (quoting *Morrissey*, 408 U.S. at 480).

As such, parolees are subject to conditions governing their activities that could not be imposed upon the general public but which, because of the special importance of monitoring their behavior, are appropriate and thus constitutional. *See Griffin*, 483 U.S. at 874-75. *See also Knights*, 534 U.S. at 120-21. Conditions which permit the government to search parolees are no different than conditions requiring substance abuse treatment, mental health treatment or other rehabilitative programming, all of which demonstrate diminished privacy expectations by a parole over his conduct and person. *Morrissey v. Brewer*, 408 U.S. at 478-79. As the Court noted in *Morrissey*, "[C]onditions serve a dual purpose; they prohibit, either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the

individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him." *Id.* at 478. As further explained by a leading commentator:

> The probation or parole officer has the primary responsibility for supervision of a parolee's or probationer's rehabilitative process. This caseworker, charged with monitoring the offender's performance, owes a responsibility to the public to ensure that probationers and parolees who pose a threat to public safety are not permitted to remain free absent compliance with conditions which obviate possible danger.

J. Gobert & N. Cohen, *The Law of Probation and Parole*, §8.02 (1983) (footnotes omitted).

It is thus apparent that parole plays an extremely important function in a State's overall penological system. The government not only must monitor the parolee's activities so as to assist the parolee's reintegration into society, but also must protect the public by taking action, where appropriate, to remove the parolee from society if the parole conditions are not met. There can be little doubt that, just like conditions requiring treatment or restricting his association with other offenders, a parole condition which permits searches by parole agents or by law enforcement officials is a significant tool in the rehabilitative process and in protecting society.

The Court's decisions addressing suspicionless searches in the drug-testing area and in closely-regulated businesses provide an apt analogy to the parole situation. In *New York v. Burger*, 482 U.S. 691

(1987), for example, the Court recognized that, as in other situations of special need, where the individual's privacy interest is weakened and the government's interest in regulation of behavior is heightened, a warrantless surprise inspection is reasonable if it meets certain criteria: a substantial governmental interest; a need for warrantless inspections to further the regulatory purpose; and the absence of unlimited discretion on the part of the inspection officers. 482 U.S. at 702-03. *Accord Vernonia School District v. Acton*, 515 U.S. at 661; *Skinner*, 489 U.S. at 627. The Court thus has recognized the value of unannounced suspicionless searches in the context of State regulation of commercial enterprises and other related situations where "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion...." *Skinner*, 489 U.S. at 624. In holding that warrantless inspections of junkyards by police officers did not violate the Fourth Amendment, the Court in *Burger* noted, "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *Id.* (*quoting United States v. Biswell*, 406 U.S. at 316). Indeed, as the Court stated in *Burger*, surprise is "crucial" if the government regulatory scheme is to function. *Burger*, 482 U.S. at 710.

If unannounced suspicionless searches are "'essential" and "crucial" in the context of commercial regulation, they surely are equally as important –if not more so – in the context of managing a State parole system charged with protecting the public. The value of the search depends upon the parole agent or police officer's ability to locate any contraband before the parolee has an opportunity to remove it or dispose of it. A parole search provision – like the unannounced inspection in the commercial regulatory situation and suspicionless drug testing in the railway transportation situation - thus enables the government to conduct a

search that serves as a "credible deterrent." *Id.*; *accord Skinner*, 489 U.S. at 628.

This is not to suggest, however, that such a consent provision should authorize all searches no matter when or how conducted. Just as prison inmates should be governed by policies and rules that are "reasonably related to legitimate penological objectivities," so too should parolees be entitled to expect that searches of their residence and person are reasonably related to the legitimate penological objectives of parole supervision. *Accord Griffin v. Wisconsin*, 483 U.S. at 876-77 (reasonable state regulation governing searches of probationers' homes satisfies Fourth Amendment).

The value of a parole search is eliminated if a parolee knows that the government must have a particular suspicion of a violation or must obtain a warrant before conducting a search. The Court in *Griffin* acknowledged the value of such a search, even on the basis of an "unauthenticated tip," 483 U.S. at 878, and held that the search of a probationer's residence based on such a tip was reasonable. *Id.* at 879.

> In such circumstances it is both unrealistic and destructive of the whole object of the continuing probation relationship to insist upon the same degree of demonstrable reliability of particular items of supporting data, *and upon the same degree if certainty of violation*, as is required in other contexts. In some cases - especially those involving drugs or illegal weapons – the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society. The agency,

> moreover, must be able to proceed on the basis of its entire experience with the probationer, and to assess probabilities in the light of its knowledge of his life, character, and circumstances.

Id. at 879 (emphasis added).

Although the present case involves a search of a parolee, and not a probationer; and the search was conducted by a police officer, and not a parole agent, the same principles should apply. Absent evidence that the search of Samson was for a purpose unrelated to a legitimate government interest such as rehabilitation or law enforcement, the search was reasonable since it was a valid condition of his parole. The Court should affirm the decision of the California Court of Appeal and establish a bright line rule allowing the States to conduct suspicionless searches of parolees as a condition of their release so long as it is not done for an illegitimate purpose or out of personal animosity directed towards the parolee.

CONCLUSION

The Court should affirm the judgment of the Court of Appeal of the State of California, First Appellate District, Division One.

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DATED: January 11, 2006

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SAMSON *v.* CALIFORNIA

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 04–9728. Argued February 22, 2006—Decided June 19, 2006

Pursuant to a California statute—which requires every prisoner eligible for release on state parole to "agree in writing to be subject to search or seizure by a parole officer or other peace officer . . . , with or without a search warrant and with or without cause"—and based solely on petitioner's parolee status, an officer searched petitioner and found methamphetamine. The trial court denied his motions to suppress that evidence, and he was convicted of possession. Affirming, the State Court of Appeal held that suspicionless searches of parolees are lawful under California law and that the search in this case was reasonable under the Fourth Amendment because it was not arbitrary, capricious, or harassing.

Held: The Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee. Pp. 3–12.

(a) The "totality of the circumstances" must be examined to determine whether a search is reasonable under the Fourth Amendment. *United States* v. *Knights*, 534 U. S. 112, 118. Reasonableness "is determined by assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.*, at 118–119. Applying this approach in *Knights*, the Court found reasonable the warrantless search of a probationer's apartment based on reasonable suspicion and a probation condition authorized by California law. In evaluating the degree of intrusion into Knights' privacy, the Court found his probationary status "salient," *id.*, at 118, observing that probation is on a continuum of possible punishments and that probationers "do not enjoy 'the absolute liberty'" of other citizens, *id.*, at 119. It also found probation searches necessary to promote legitimate governmental interests of

integrating probationers back into the community, combating recidivism, and protecting potential victims. Balancing those interests, the intrusion was reasonable. However, because the search was predicated on both the probation search condition and reasonable suspicion, the Court did not address the reasonableness of a search solely predicated upon the probation condition. Pp. 3–5.

(b) Parolees, who are on the "continuum" of state-imposed punishments, have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is. "The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abides by certain rules during the balance of the sentence." *Morrissey* v. *Brewer*, 408 U. S. 471, 477. California's system is consistent with these observations. An inmate electing to complete his sentence out of physical custody remains in the Department of Corrections' legal custody for the remainder of his term and must comply with the terms and conditions of his parole. The extent and reach of those conditions demonstrate that parolees have severely diminished privacy expectations by virtue of their status alone. Additionally, as in *Knights*, the state law's parole search condition was clearly expressed to petitioner, who signed an order submitting to the condition and thus was unambiguously aware of it. Examining the totality of the circumstances, petitioner did not have an expectation of privacy that society would recognize as legitimate. The State's interests, by contrast, are substantial. A State has an "overwhelming interest" in supervising parolees because they "are more likely to commit future criminal offenses." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 365. Similarly, a State's interests in reducing recidivism, thereby promoting reintegration and positive citizenship among probationers and parolees, warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment. The Amendment does not render States powerless to address these concerns effectively. California's 60-to70-percent recidivism rate demonstrates that most parolees are ill prepared to handle the pressures of reintegration and require intense supervision. The State Legislature has concluded that, given the State's number of parolees and its high recidivism rate, an individualized suspicion requirement would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders. Contrary to petitioner's argument, the fact that some States and the Federal Government require a level of individualized suspicion before searching a parolee is of little relevance in determining whether California's system is drawn to meet the State's needs and is reasonable, taking into account a parolee's substantially diminished expectation of privacy. Nor is there merit to the argu-

Syllabus

ment that California's law grants discretion without procedural safeguards. The concern that the system gives officers unbridled discretion to conduct searches, thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into society, is belied by the State's prohibition on arbitrary, capricious, or harassing searches. And petitioner's concern that the law frustrates reintegration efforts by permitting intrusions into the privacy interests of third persons is unavailing because that concern would arise under a suspicion-based system as well. Pp. 5–12.

Affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER and BREYER, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–9728

DONALD CURTIS SAMSON, PETITIONER *v.* CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

[June 19, 2006]

JUSTICE THOMAS delivered the opinion of the Court.

California law provides that every prisoner eligible for release on state parole "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Cal. Penal Code Ann. §3067(a) (West 2000). We granted certiorari to decide whether a suspicionless search, conducted under the authority of this statute, violates the Constitution. We hold that it does not.

I

In September 2002, petitioner Donald Curtis Samson was on state parole in California, following a conviction for being a felon in possession of a firearm. On September 6, 2002, Officer Alex Rohleder of the San Bruno Police Department observed petitioner walking down a street with a woman and a child. Based on a prior contact with petitioner, Officer Rohleder was aware that petitioner was on parole and believed that he was facing an at large warrant. Accordingly, Officer Rohleder stopped petitioner and asked him whether he had an outstanding parole warrant.

Petitioner responded that there was no outstanding warrant and that he "was in good standing with his parole agent." Brief for Petitioner 4. Officer Rohleder confirmed, by radio dispatch, that petitioner was on parole and that he did not have an outstanding warrant. Nevertheless, pursuant to Cal. Penal Code Ann. §3067(a) (West 2000) and based solely on petitioner's status as a parolee, Officer Rohleder searched petitioner. During the search, Officer Rohleder found a cigarette box in petitioner's left breast pocket. Inside the box he found a plastic baggie containing methamphetamine.

The State charged petitioner with possession of methamphetamine pursuant to Cal. Health & Safety Code Ann. §11377(a) (West 1991). The trial court denied petitioner's motion to suppress the methamphetamine evidence, finding that Cal. Penal Code Ann. §3067(a) (West 2000) authorized the search and that the search was not "arbitrary or capricious." App. 62–63 (Proceedings on Motion to Supress). A jury convicted petitioner of the possession charge and the trial court sentenced him to seven years' imprisonment.

The California Court of Appeal affirmed. Relying on *People* v. *Reyes*, 19 Cal. 4th 743, 968 P. 2d 445 (1998), the court held that suspicionless searches of parolees are lawful under California law; that "'[s]uch a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing'"; and that the search in this case was not arbitrary, capricious, or harassing. No. A102394 (Ct. App. Cal., 1st App. Dist., Oct. 14, 2004), App. 12–14.

We granted certiorari, 545 U. S. ___ (2005), to answer a variation of the question this Court left open in *United States* v. *Knights*, 534 U. S. 112, 120, n. 6 (2001)—whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would

not offend the Fourth Amendment.[1] Answering that question in the affirmative today, we affirm the judgment of the California Court of Appeal.

II

"[U]nder our general Fourth Amendment approach" we "examin[e] the totality of the circumstances" to determine whether a search is reasonable within the meaning of the Fourth Amendment. *Id.*, at 118 (internal quotation marks omitted). Whether a search is reasonable "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.*, at 118–119 (internal quotation marks omitted).

We recently applied this approach in *United States* v. *Knights*. In that case, California law required Knights, as a probationer, to "'[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.'" *Id.*, at 114 (brackets in original). Several days after Knights had been placed on probation, police suspected that he had been involved in several incidents of arson and vandalism. Based upon that suspicion and pursuant to the search condition of his probation, a police officer conducted a warrantless search of Knights' apartment and found arson and drug paraphernalia. *Id.*, at 115–116.

We concluded that the search of Knights' apartment was reasonable. In evaluating the degree of intrusion into

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[1] *Knights*, 534 U. S., at 120, n. 6 ("We do not decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment").

Knights' privacy, we found Knights' probationary status "salient," *id.*, at 118, observing that "[p]robation is 'one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.'" *Id.*, at 119 (quoting *Griffin* v. *Wisconsin*, 483 U. S. 868, 874 (1987)). Cf. *Hudson* v. *Palmer*, 468 U. S. 517, 530 (1984) (holding that prisoners have no reasonable expectation of privacy). We further observed that, by virtue of their status alone, probationers "'do not enjoy "the absolute liberty to which every citizen is entitled,"'" *Knights*, *supra*, at 119 (quoting *Griffin*, *supra*, at 874, in turn quoting *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972)), justifying the "impos[ition] [of] reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Knights*, *supra*, at 119. We also considered the facts that Knights' probation order clearly set out the probation search condition, and that Knights was clearly informed of the condition. See *Knights*, 534 U. S., at 119. We concluded that under these circumstances, Knights' expectation of privacy was significantly diminished. See *id.*, at 119–120.

We also concluded that probation searches, such as the search of Knights' apartment, are necessary to the promotion of legitimate governmental interests. Noting the State's dual interest in integrating probationers back into the community and combating recidivism, see *id.*, at 120–121, we credited the "'assumption'" that, by virtue of his status, a probationer "'is more likely than the ordinary citizen to violate the law.'" *Id.*, at 120 (quoting *Griffin*, *supra*, at 880). We further found that "probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in

which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply." *Knights*, 534 U. S., at 120. We explained that the State did not have to ignore the reality of recidivism or suppress its interests in "protecting potential victims of criminal enterprise" for fear of running afoul of the Fourth Amendment. *Id.*, at 121.

Balancing these interests, we held that "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." *Ibid.* Because the search at issue in *Knights* was predicated on both the probation search condition and reasonable suspicion, we did not reach the question whether the search would have been reasonable under the Fourth Amendment had it been solely predicated upon the condition of probation. *Id.*, at 120, n. 6. Our attention is directed to that question today, albeit in the context of a parolee search.

III

As we noted in *Knights*, parolees are on the "continuum" of state-imposed punishments. *Id.*, at 119 (internal quotation marks omitted). On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment. As this Court has pointed out, "parole is an established variation on imprisonment of convicted criminals. . . . The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abides by certain rules during the balance of the sentence." *Morrissey*, *supra*, at 477. "In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357,

365 (1998). See also *United States* v. *Reyes*, 283 F. 3d 446, 461 (CA2 2002) ("[F]ederal supervised release, . . . in contrast to probation, is meted out in addition to, not in lieu of, incarceration" (citation and internal quotation marks omitted)); *United States* v. *Cardona*, 903 F. 2d 60, 63 (CA1 1990) ("[O]n the Court's continuum of possible punishments, parole is the stronger medicine; ergo, parolees enjoy even less of the average citizen's absolute liberty than do probationers" (internal quotation marks and citation omitted)).[2]

California's system of parole is consistent with these observations: A California inmate may serve his parole period either in physical custody, or elect to complete his sentence out of physical custody and subject to certain conditions. Cal. Penal Code Ann. §3060.5 (West 2000). Under the latter option, an inmate-turned-parolee remains in the legal custody of the California Department of Corrections through the remainder of his term, §3056, and

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[2]Contrary to the dissent's contention, nothing in our recognition that parolees are more akin to prisoners than probationers is inconsistent with our precedents. Nor, as the dissent suggests, do we equate parolees with prisoners for the purpose of concluding that parolees, like prisoners, have no Fourth Amendment rights. See *post*, at 5 (opinion of STEVENS, J.). That view misperceives our holding. If that were the basis of our holding, then this case would have been resolved solely under *Hudson* v. *Palmer*, 468 U. S. 517 (1984), and there would have been no cause to resort to Fourth Amendment analysis. See *ibid.* (holding traditional Fourth Amendment analysis of the totality of the circumstances inapplicable to the question whether a prisoner had a reasonable expectation of privacy in his prison cell). Nor is our rationale inconsistent with *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972). In that case, the Court recognized that restrictions on a parolee's liberty are not unqualified. That statement, even if accepted as a truism, sheds no light on the extent to which a parolee's constitutional rights are indeed limited—and no one argues that a parolee's constitutional rights are not limited. *Morrissey* itself does not cast doubt on today's holding given that the liberty at issue in that case—the Fourteenth Amendment Due Process right to a hearing before revocation of parole—invokes wholly different analysis than the search at issue here.

must comply with all of the terms and conditions of parole, including mandatory drug tests, restrictions on association with felons or gang members, and mandatory meetings with parole officers, Cal. Code Regs., tit. 15, §2512 (2005); Cal. Penal Code Ann. §3067 (West 2000). See also *Morrissey*, *supra*, at 478 (discussing other permissible terms and conditions of parole). General conditions of parole also require a parolee to report to his assigned parole officer immediately upon release, inform the parole officer within 72 hours of any change in employment status, request permission to travel a distance of more than 50 miles from the parolee's home, and refrain from criminal conduct and possession of firearms, specified weapons, or knives unrelated to employment. Cal. Code Regs., tit. 15, §2512. Parolees may also be subject to special conditions, including psychiatric treatment programs, mandatory abstinence from alcohol, residence approval, and "[a]ny other condition deemed necessary by the Board [of Parole Hearings] or the Department [of Corrections and Rehabilitation] due to unusual circumstances." §2513. The extent and reach of these conditions clearly demonstrate that parolees like petitioner have severely diminished expectations of privacy by virtue of their status alone.

Additionally, as we found "salient" in *Knights* with respect to the probation search condition, the parole search condition under California law—requiring inmates who opt for parole to submit to suspicionless searches by a parole officer or other peace officer "at any time," Cal. Penal Code Ann. §3067(a) (West 2000)—was "clearly expressed" to petitioner. *Knights*, 534 U. S., at 119. He signed an order submitting to the condition and thus was "unambiguously" aware of it. *Ibid.* In *Knights*, we found that acceptance of a clear and unambiguous search condition "significantly diminished Knights' reasonable expectation of privacy." *Id.*, at 120. Examining the totality of the circumstances pertaining to petitioner's status as a

parolee, "an established variation on imprisonment," *Morrissey*, 408 U. S., at 477, including the plain terms of the parole search condition, we conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate.[3]

The State's interests, by contrast, are substantial. This Court has repeatedly acknowledged that a State has an "overwhelming interest" in supervising parolees because "parolees. . . are more likely to commit future criminal offenses." *Pennsylvania Bd. of Probation and Parole*, 524 U. S., at 365 (explaining that the interest in combating recidivism "is the very premise behind the system of close parole supervision"). Similarly, this Court has repeatedly acknowledged that a State's interests in reducing recidivism and thereby promoting reintegration and positive citizen-

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[3]Because we find that the search at issue here is reasonable under our general Fourth Amendment approach, we need not reach the issue whether "acceptance of the search condition constituted consent in the *Schneckloth* [v. *Bustamonte*, 412 U. S. 218 (1973),] sense of a complete waiver of his Fourth Amendment rights." *United States* v. *Knights*, 534 U. S. 112, 118 (2001). The California Supreme Court has not yet construed Cal. Penal Code Ann. §3067 (West 2000), the statute which governs parole for crimes committed after 1996, and which imposes the consent requirement. The California Court of Appeal has, and it has concluded that, under §3067(b), "inmates who are otherwise eligible for parole yet refuse to agree to the mandatory search condition will remain imprisoned . . . until either the inmate (1) agrees to the search condition and is otherwise eligible for parole or (2) has lost all worktime credits and is eligible for release after having served the balance of his/her sentence." *People* v. *Middleton*, 131 Cal. App. 4th 732, 739–740, 31 Cal. Rptr. 3d 813, 818 (2005). Nonetheless, we decline to rest our holding today on the consent rationale. The California Supreme Court, we note, has not yet had a chance to address the question squarely, and it is far from clear that the State properly raised its consent theory in the courts below.

Nor do we address whether California's parole search condition is justified as a special need under *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987), because our holding under general Fourth Amendment principles renders such an examination unnecessary.

ship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment. See *Griffin*, 483 U. S., at 879; *Knights*, *supra*, at 121.

The empirical evidence presented in this case clearly demonstrates the significance of these interests to the State of California. As of November 30, 2005, California had over 130,000 released parolees. California's parolee population has a 68-to-70 percent recidivism rate. See California Attorney General, Crime in California 37 (Apr. 2001) (explaining that 68 percent of adult parolees are returned to prison, 55 percent for a parole violation, 13 percent for the commission of a new felony offense); J. Petersilia, Challenges of Prisoner Reentry and Parole in California, 12 California Policy Research Center Brief, p. 2 (June 2000), available at http://www.ucop.edu/cprc/parole.pdf (as visited June 15, 2006, and available in Clerk of Court's case file) ("70% of the state's paroled felons reoffend within 18 months—the highest recidivism rate in the nation"). This Court has acknowledged the grave safety concerns that attend recidivism. See *Ewing* v. *California*, 538 U. S. 11, 26 (2003) (plurality opinion) ("Recidivism is a serious public safety concern in California and throughout the Nation").

As we made clear in *Knights*, the Fourth Amendment does not render the States powerless to address these concerns *effectively*. See 534 U. S., at 121. Contrary to petitioner's contention, California's ability to conduct suspicionless searches of parolees serves its interest in reducing recidivism, in a manner that aids, rather than hinders, the reintegration of parolees into productive society.

In California, an eligible inmate serving a determinate sentence may elect parole when the actual days he has served plus statutory time credits equal the term imposed by the trial court, Cal. Penal Code Ann. §§2931, 2933,

3000(b)(1) (West 2000), irrespective of whether the inmate is capable of integrating himself back into productive society. As the recidivism rate demonstrates, most parolees are ill prepared to handle the pressures of reintegration. Thus, most parolees require intense supervision. The California Legislature has concluded that, given the number of inmates the State paroles and its high recidivism rate, a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders. This conclusion makes eminent sense. Imposing a reasonable suspicion requirement, as urged by petitioner, would give parolees greater opportunity to anticipate searches and conceal criminality. See *Knights*, *supra*, at 120; *Griffin*, 483 U. S., at 879. This Court concluded that the incentive-to-conceal concern justified an "intensive" system for supervising probationers in *Griffin*, *id.*, at 875. That concern applies with even greater force to a system of supervising parolees. See *United States* v. *Reyes*, 283 F. 3d, at 461 (observing that the *Griffin* rationale "appl[ies] *a fortiori*" to "federal supervised release, which, in contrast to probation, is 'meted out in addition to, not in lieu of, incareration'"); *United States* v. *Crawford*, 372 F. 3d 1048, 1077 (CA9 2004) (en banc) (Kleinfeld, J., concurring) (explaining that parolees, in contrast to probationers, "have been sentenced to prison for felonies and released before the end of their prison terms" and are "deemed to have acted more harmfully than anyone except those felons not released on parole"); *Hudson*, 468 U. S., at 526 (persons sentenced to terms of imprisonment have been "deemed to have acted more harmfully than anyone except those felons not released on parole"); *id.*, at 529 (observing that it would be "naive" to institute a system of "'planned random searches'" as that would allow prisoners to "anticipate" searches, thus defeating the purpose of random searches).

Petitioner observes that the majority of States and the Federal Government have been able to further similar interests in reducing recidivism and promoting reintegration, despite having systems that permit parolee searches based upon some level of suspicion. Thus, petitioner contends, California's system is constitutionally defective by comparison. Petitioner's reliance on the practices of jurisdictions other than California, however, is misplaced. That some States and the Federal Government require a level of individualized suspicion is of little relevance to our determination whether California's supervisory system is drawn to meet its needs and is reasonable, taking into account a parolee's substantially diminished expectation of privacy.[4]

Nor is there merit to the argument that California's parole search law permits "a blanket grant of discretion

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[4]The dissent argues that, "once one acknowledges that parolees do have legitimate expectations of privacy beyond those of prisoners, our Fourth Amendment jurisprudence does not permit the conclusion, reached by the Court here for the first time, that a search supported by neither individualized suspicion nor 'special needs' is nonetheless 'reasonable.'" *Post*, at 2. That simply is not the case. The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion. Thus, while this Court's jurisprudence has often recognized that "to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 560 (1976), we have also recognized that the "Fourth Amendment imposes no irreducible requirement of such suspicion," *id.*, at 561. Therefore, although this Court has only sanctioned suspicionless searches in limited circumstances, namely programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be "reasonable" under the Fourth Amendment. In light of California's earnest concerns respecting recidivism, public safety, and reintegration of parolees into productive society, and because the object of the Fourth Amendment is *reasonableness*, our decision today is far from remarkable. Nor, given our prior precedents and caveats, is it "unprecedented." *Post*, at 1.

untethered by any procedural safeguards," *post*, at 1 (STEVENS, J., dissenting). The concern that California's suspicionless search system gives officers unbridled discretion to conduct searches, thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society, is belied by California's prohibition on "arbitrary, capricious or harassing" searches. See *Reyes*, 19 Cal. 4th, at 752, 753–754, 968 P. 2d, at 450, 451; *People* v. *Bravo*, 43 Cal. 3d 600, 610, 738 P. 2d 336, 342 (1987) (probation); see also Cal. Penal Code Ann. §3067(d) (West 2000) ("It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment").[5] The dissent's claim that parolees under California law are subject to capricious searches conducted at the unchecked "whim" of law enforcement officers, *post*, at 3, 4, ignores this prohibition. Likewise, petitioner's concern that California's suspicionless search law frustrates reintegration efforts by permitting intrusions into the privacy interests of third parties is also unavailing because that concern would arise under a suspicion-based regime as well.

IV

Thus, we conclude that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee. Accordingly, we affirm the judgment of the California Court of Appeal.

It is so ordered.

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[5]Under California precedent, we note, an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee. See *People* v. *Sanders*, 31 Cal. 4th 318, 331–332, 73 P. 3d 496, 505–506 (2003); Brief for United States as *Amicus Curiae* 20.

SUPREME COURT OF THE UNITED STATES

No. 04–9728

DONALD CURTIS SAMSON, PETITIONER *v.*
CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

[June 19, 2006]

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE BREYER join, dissenting.

Our prior cases have consistently assumed that the Fourth Amendment provides some degree of protection for probationers and parolees. The protection is not as robust as that afforded to ordinary citizens; we have held that probationers' lowered expectation of privacy may justify their warrantless search upon reasonable suspicion of wrongdoing, see *United States* v. *Knights*, 534 U. S. 112 (2001). We have also recognized that the supervisory responsibilities of probation officers, who are required to provide "'individualized counseling'" and to monitor their charges' progress, *Griffin* v. *Wisconsin*, 483 U. S. 868, 876–877 (1987), and who are in a unique position to judge "how close a supervision the probationer requires," *id.*, at 876, may give rise to special needs justifying departures from Fourth Amendment strictures. See *ibid.* ("Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen"). But neither *Knights* nor *Griffin* supports a regime of suspicionless searches, conducted pursuant to a blanket grant of discretion untethered by any procedural safeguards, by law enforcement personnel who have no special interest in the welfare of the parolee or probationer.

What the Court sanctions today is an unprecedented curtailment of liberty. Combining faulty syllogism with circular reasoning, the Court concludes that parolees have no more legitimate an expectation of privacy in their persons than do prisoners. However superficially appealing that parity in treatment may seem, it runs roughshod over our precedent. It also rests on an intuition that fares poorly under scrutiny. And once one acknowledges that parolees do have legitimate expectations of privacy beyond those of prisoners, our Fourth Amendment jurisprudence does not permit the conclusion, reached by the Court here for the first time, that a search supported by neither individualized suspicion nor "special needs" is nonetheless "reasonable."

The suspicionless search is the very evil the Fourth Amendment was intended to stamp out. See *Boyd* v. *United States*, 116 U. S. 616, 625–630 (1886); see also, *e.g.*, *Indianapolis* v. *Edmond*, 531 U. S. 32, 37 (2000). The pre-Revolutionary "writs of assistance," which permitted roving searches for contraband, were reviled precisely because they "placed 'the liberty of every man in the hands of every petty officer.'" *Boyd*, 116 U. S., at 625. While individualized suspicion "is not an 'irreducible' component of reasonableness" under the Fourth Amendment, *Edmond*, 531 U. S., at 37 (quoting *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 561 (1976)), the requirement has been dispensed with only when programmatic searches were required to meet à "'special need' . . . divorced from the State's general interest in law enforcement." *Ferguson* v. *Charleston*, 532 U. S. 67, 79 (2001); see *Edmond*, 531 U. S., at 37; see also *Griffin*, 483 U. S., at 873 ("Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), . . . we have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the

warrant and probable-cause requirement impracticable'").

Not surprisingly, the majority does not seek to justify the search of petitioner on "special needs" grounds. Although the Court has in the past relied on special needs to uphold warrantless searches of probationers, *id.*, at 873, 880, it has never gone so far as to hold that a probationer or parolee may be subjected to full search at the whim of any law enforcement officer he happens to encounter, whether or not the officer has reason to suspect him of wrongdoing. *Griffin*, after all, involved a search *by a probation officer* that was supported by *reasonable suspicion*. The special role of probation officers was critical to the analysis; "we deal with a situation," the Court explained, "in which there is an ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial—between the object of the search and the decisionmaker." *Id.*, at 879. The State's interest or "special need," as articulated in *Griffin*, was an interest in supervising the wayward probationer's reintegration into society—not, or at least not principally, the general law enforcement goal of detecting crime, see *ante*, at 8–9.[1]

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[1] As we observed in *Ferguson* v. *Charleston*, 532 U. S. 67 (2001), *Griffin*'s special needs rationale was cast into doubt by our later decision in *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602 (1989), which reserved the question whether "'routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the . . . program.'" *Ferguson*, 532 U. S., at 79, n. 15 (quoting *Skinner*, 489 U. S., at 621, n. 5). But at least the State in *Griffin* could in good faith contend that its warrantless searches were supported by a special need conceptually distinct from law enforcement goals generally. Indeed, that a State's interest in supervising its parolees and probationers to ensure their smooth reintegration may occasionally diverge from its general law enforcement aims is illustrated by this very case. Petitioner's possession of a small amount of illegal drugs would not have been grounds for revocation of his parole. See Cal. Penal Code Ann. §3063.1(a) (West Supp. 2006). Presumably, the California Legislature determined that it is unnecessary and perhaps even counterproductive, as a means of further-

It is no accident, then, that when we later upheld the search of a probationer *by a law enforcement officer* (again, based on reasonable suspicion), we forwent any reliance on the special needs doctrine. See *Knights*, 534 U. S. 112. Even if the supervisory relationship between a probation officer and her charge may properly be characterized as one giving rise to needs "divorced from the State's general interest in law enforcement," *Ferguson*, 532 U. S., at 79; but see *id.*, at 79, n. 15, the relationship between an ordinary law enforcement officer and a probationer unknown to him may not. "None of our special needs precedents has sanctioned the routine inclusion of law enforcement, both in the design of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives." *Id.*, at 88 (KENNEDY, J., concurring in judgment).

Ignoring just how "closely guarded" is that "category of constitutionally permissible suspicionless searches," *Chandler* v. *Miller*, 520 U. S. 305, 309 (1997), the Court for the first time upholds an entirely suspicionless search unsupported by any special need. And it goes further: In special needs cases we have at least insisted upon programmatic safeguards designed to ensure evenhandedness in application; if individualized suspicion is to be jettisoned, it must be replaced with measures to protect against the state actor's unfettered discretion. See, *e.g.*, *Delaware* v. *Prouse*, 440 U. S. 648, 654–655 (1979) (where a special need "precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field'" (quoting *Camara* v. *Municipal*

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ing the goals of the parole system, to reincarcerate former prisoners for simple possession. The general law enforcement interests the State espouses, by contrast, call for reincarceration.

Court of City and County of San Francisco, 387 U. S. 523, 532 (1967); footnote omitted); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 882 (1975) ("[T]he reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government"). Here, by contrast, there are no policies in place—no "standards, guidelines, or procedures," *Prouse*, 440 U. S., at 650—to rein in officers and furnish a bulwark against the arbitrary exercise of discretion that is the height of unreasonableness.

The Court is able to make this unprecedented move only by making another. Coupling the dubious holding of *Hudson* v. *Palmer*, 468 U. S. 517 (1984), with the bald statement that "parolees have fewer expectations of privacy than probationers," *ante*, at 5, the Court two-steps its way through a faulty syllogism and, thus, avoids the application of Fourth Amendment principles altogether. The logic, apparently, is this: Prisoners have no legitimate expectation of privacy; parolees are like prisoners; therefore, parolees have no legitimate expectation of privacy. The conclusion is remarkable not least because we have long embraced its opposite.[2] It also rests on false premises. First, it is simply not true that a parolee's status, vis-à-vis either the State or the Constitution, is tantamount to that of a prisoner or even materially distinct from that of a probationer. See *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972) ("Though the State properly subjects [a parolee] to many restrictions not applicable to other

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[2]See *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972) ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty"); *Griffin* v. *Wisconsin*, 483 U. S. 868, 875 (1987) (the "degree of impingement upon [a probationer's] privacy . . . is not unlimited"); see also *Ferguson*, 532 U. S., at 101 (SCALIA, J., dissenting) ("I doubt whether Griffin's reasonable expectation of privacy in his home was any less than petitioners' reasonable expectation of privacy in their urine taken").

citizens, his condition is very different from that of confinement in a prison"). A parolee, like a probationer, is set free in the world subject to restrictions intended to facilitate supervision and guard against antisocial behavior. As with probation, "the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 365 (1998). Certainly, parole differs from probation insofar as parole is "'meted out in addition to, not in lieu of, incarceration.'" *Ante*, at 6 (quoting *United States* v. *Reyes*, 283 F. 3d 446, 461 (CA2 2002)). And, certainly, parolees typically will have committed more serious crimes—ones warranting a prior term of imprisonment—than probationers. The latter distinction, perhaps, would support the conclusion that a State has a stronger interest in supervising parolees than it does in supervising probationers. But see *United States* v. *Williams*, 417 F. 3d 373, 376, n. 1 (CA3 2005) ("'[T]here is no constitutional difference between probation and parole for purposes of the [F]ourth [A]mendment'"). But why either distinction should result in refusal to acknowledge as legitimate, when harbored by parolees, the same expectation of privacy that probationers reasonably may harbor is beyond fathom.

In any event, the notion that a parolee legitimately expects only so much privacy as a prisoner is utterly without foundation. *Hudson* v. *Palmer* does stand for the proposition that "[a] right of privacy in traditional Fourth Amendment terms" is denied individuals who are incarcerated. 468 U. S., at 527. But this is because it "is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, . . . chief among which is internal security." *Id.*, at 524; see *id.*, at 538 (O'Connor, J., concurring) ("I agree that the government's compelling interest in prison safety, together with the necessarily ad hoc judgments required of prison

officials, make prison cell searches and seizures appropriate for categorical treatment"[3]); see also *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 680 (1989) (SCALIA, J., dissenting). These "institutional needs"—safety of inmates and guards, "internal order," and sanitation, *Hudson*, 468 U. S., at 527–528—manifestly do not apply to parolees. As discussed above and in *Griffin*, *other* state interests may warrant certain intrusions into a parolee's privacy, but *Hudson*'s rationale cannot be mapped blindly onto the situation with which we are presented in this case.

Nor is it enough, in deciding whether someone's expectation of privacy is "legitimate," to rely on the existence of the offending condition or the individual's notice thereof. Cf. *ante*, at 7. The Court's reasoning in this respect is entirely circular. The mere fact that a particular State refuses to acknowledge a parolee's privacy interest cannot mean that a parolee in that State has no expectation of privacy that society is willing to recognize as legitimate—especially when the measure that invades privacy is both the *subject* of the Fourth Amendment challenge and a clear outlier. With only one or two arguable exceptions, neither the Federal Government nor any other State subjects parolees to searches of the kind to which petitioner was subjected. And the fact of notice hardly cures the circularity; the loss of a subjective expectation of privacy would play "no meaningful role" in analyzing the legitimacy of expectations, for example, "if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry." *Smith* v. *Maryland*, 442 U. S. 735, 740–741, n. 5

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[3]Particularly in view of Justice O'Connor's concurrence, which emphasized the prison's programmatic interests in conducting suspicionless searches, see *Hudson*, 468 U. S., at 538. *Hudson* is probably best understood as a "special needs" case—not as standing for the blanket proposition that prisoners have no Fourth Amendment rights.

(1979).[4]

Threaded through the Court's reasoning is the suggestion that deprivation of Fourth Amendment rights is part and parcel of any convict's punishment. See *ante*, at 4–6.[5] If a person may be subject to random and suspicionless searches in prison, the Court seems to assume, then he cannot complain when he is subject to the same invasion outside of prison, so long as the State still *can* imprison him. Punishment, though, is not the basis on which *Hudson* was decided. (Indeed, it is settled that a prison inmate "'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Turner* v. *Safley*, 482 U. S. 78, 95 (1987).) Nor, to my knowledge, have we ever sanctioned the use of any search as a punitive measure. Instead, the question in every case must be whether the balance of legitimate expectations of privacy, on the one hand, and the State's interests in conducting the relevant search, on the other, justifies dispensing with

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[4]Likewise, the State's argument that a California parolee "consents" to the suspicionless search condition is sophistry. Whether or not a prisoner can choose to remain in prison rather than be released on parole, cf. *ante*, at 8, n. 3, he has no "choice" concerning the search condition: he may either remain in prison, where he will be subjected to suspicionless searches, or he may exit prison and still be subject to suspicionless searches. Accordingly, "to speak of consent in this context is to resort to a manifest fiction, for the [parolee] who purportedly waives his rights by accepting such a condition has little genuine option to refuse." 5 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment §10.10(b), pp. 440–441 (4th ed. 2004).

[5]This is a vestige of the long-discredited "act of grace" theory of parole. Compare *Escoe* v. *Zerbst*, 295 U. S. 490, 492–493 (1935) ("Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose"), with *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782, n. 4 (1973) ("a probationer can no longer be denied due process, in reliance on the dictum in *Escoe* v. *Zerbst*, that probation is an 'act of grace'" (citation omitted)). See also *Morrissey*, 408 U. S., at 482.

the warrant and probable-cause requirements that are otherwise dictated by the Fourth Amendment. That balance is not the same in prison as it is out. We held in *Knights*—without recourse to *Hudson*—that the balance favored allowing the State to conduct searches based on reasonable suspicion. Never before have we plunged below that floor absent a demonstration of "special needs."

Had the State imposed as a condition of parole a requirement that petitioner submit to random searches by his parole officer, who is "supposed to have in mind the welfare of the [parolee]" and guide the parolee's transition back into society, *Griffin*, 483 U. S., at 876–877, the condition might have been justified either under the special needs doctrine or because at least part of the requisite "reasonable suspicion" is supplied in this context by the individual-specific knowledge gained through the supervisory relationship. See *id.*, at 879 (emphasizing probation office's ability to "assess probabilities in the light of its knowledge of [the probationer's] life, character, and circumstances"). Likewise, this might have been a different case had a court or parole board imposed the condition at issue based on specific knowledge of the individual's criminal history and projected likelihood of reoffending, or if the State had had in place programmatic safeguards to ensure evenhandedness. See *supra*, at 4. Under either of those scenarios, the State would at least have gone some way toward averting the greatest mischief wrought by officials' unfettered discretion. But the search condition here is imposed on *all* parolees—whatever the nature of their crimes, whatever their likelihood of recidivism, and whatever their supervisory needs—without any programmatic procedural protections.[6]

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[6]The Court devotes a good portion of its analysis to the recidivism rates among parolees in California. See *ante*, at 8–9. One might question whether those statistics, which postdate the California Su-

The Court seems to acknowledge that unreasonable searches "inflic[t] dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society." *Ante*, at 11; see *Terry* v. *Ohio*, 392 U. S. 1, 19, 29 (1968). It is satisfied, however, that the California courts' prohibition against "'arbitrary, capricious or harassing'" searches suffices to avert those harms—which are of course counterproductive to the State's purported aim of rehabilitating former prisoners and reintegrating them into society. See *ante*, at 11 (citing *People* v. *Reyes*, 19 Cal. 4th 743, 968 P. 2d 445 (1998)). I am unpersuaded. The requirement of individualized suspicion, in all its iterations, is the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment. To say that those evils may be averted without that shield is, I fear, to pay lipservice to the end while withdrawing the means.[7]

Respectfully, I dissent.

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preme Court's decision to allow the purportedly recidivism-reducing suspicionless searches at issue here, actually demonstrate that the State's interest is being served by the searches. Cf. Reply Brief for Petitioner 10, and n. 10. Of course, one cannot deny that the interest itself is valid. That said, though, it has never been held sufficient to justify suspicionless searches. If high crime rates were grounds enough for disposing of Fourth Amendment protections, the Amendment long ago would have become a dead letter.

[7] As the Court observes, see *ante*, at 12, n. 5, under California law "an officer is entitled to conduct suspicionless searches only of persons known by him to be parolees." Brief for United States as *Amicus Curiae* 20 (citing *People* v. *Sanders*, 31 Cal. 4th 318, 331–332, 73 P. 3d 496, 505 (2003)). It would necessarily be arbitrary, capricious, and harassing to conduct a suspicionless search of someone without knowledge of the status that renders that person, in the State's judgment, susceptible to such an invasion.